87-1219

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1987

G. & T. TERMINAL PACKAGING CO., INC., and ANTHONY SPINALE,

Petitioners,

-vs-

CONSOLIDATED RAIL CORPORATION,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit. (Third Circuit No.86-5897)

APPENDIX FOR PETITIONERS

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5897

G. & T. TERMINAL PACKAGING CO., INC.
and ANTHONY SPINALE,
Appellants

v.

CONSOLIDATED RAIL CORPORATION,

On Appeal from the United State District
Court for the District
of New Jersey-Newark
(D.C. Civil No. 84-1173)

Argued: June 22, 1987
Before: GIBBONS, Chief Judge,
WEIS and ALDISERT, Circuit Judges
(Filed September 23, 1987)

Appendix A

OPINION OF THE COURT

GIBBONS, Chief Judge:

Several rail shippers[1] of agricultural commodities appeal from a summary judgment in favor of Consolidated Rail Corp. (Conrail) in their action set aside rates fixed by Conrail for their shipments. The shippers' appeal poses the question whether the Congressional decision in the Railroad Revitalization and Regulatory Reform Act of 1976 (4 R Act), Pub. L. No. 94-210, 90 Stat. 31, and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1898, in favor of deregulation of most rail tariffs should be deemed to have overruled the holding in Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) that courts may not entertain common law challenges to rates established pursuant to the Interest Commerce Act. 49 U.S.C. §§ 10101-11917. The district court

held that the Abilene Cotton Oil rule survives the 4 R Act and the Staggers Rail Act. We affirm.

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1. The shippers are G & T Terminal Packaging Co., Inc., Mr. Sprout, Inc., Tray Wrap, Inc., and Anthony Spinale. The shippers are located at Hunts Point Market or Kingsbridge, Bronx, New York. They purchase for resale potatoes or brussel sprouts grown in the western United States.

I.

On April 10, 1980 rates for rail transportation of potatoes and other agricultural commodities were exempted from regulation under the Interstate Commerce Act. Ex Parte No. 436 (Sub No. 2), Rail Commodities (filed March 24, 1980), 45 Fed. Reg. 204 (1980). The Plaintiff shippers are served by Conrail, which delivers to them at Hunts Point or Kingbridge rail car shipments of potatoes and other commodities received from western connecting carriers. Apparently because the plaintiff shippers filed numerous claims against Conrail for loss or damage, Conrail informed all western connecting carriers in May or June of 1983 that it was imposing a surcharge of $500 or $600 per car (depending on the point of origin) on all rail car shipments to them. A Conrail internal memorandum noted that one of the plaintiff shippers had filed claims for amounts exceeding Conrail's revenues. Faced

with the surcharges of $500 or $600 per car, the shippers on September 30, 1983 wrote a letter to the Chairman of the Interstate Commerce Commission, contending that the rates were discriminatory and unreasonable and inquiring whether the Commission retained any jurisdiction over them. Herbert Hardy, Director of the Office of Proceedings, directed by ICC Chairman Taylor, responded:

> The Interstate Commerce Commission no longer exercises jurisdiction over the rates charged by the railroads for the movement of the commodities covered by the exemption or over the practices engaged in by the railroads in the course of transporting them. Because your client and its affiliates appear to deal only in products covered by the agricultural commodities exemption, any dispute they may have with Conrail, or other railroads would have to be settled

in the courts rather than before the Commission.

After receiving Mr. Hardy's letter, the shippers filed in the district court a seven count complaint alleging that the new rates violated the Interstate Commerce Act, 49 U.S.C. § 10101-11917, the common law, the antitrust laws, and the United States Constitution. In essence the common law claims assert that the decision by Conrail to impose a surcharge on shipments to the plaintiff shippers was made in retaliation for the shippers pursuing valid claims for past damages and delays, and discriminated against them in comparison with shippers similarly situated. The district judge to whom the case was first assigned granted Conrail's motion for summary judgment on the Interstate Commerce Act and constitutional claims. The antitrust claims were later dismissed with prejudice by stipulation.

Conrail's motion for summary judgment on the shippers' common law claims was initially denied.

In September, 1985, Conrail filed a petition with the Interstate Commerce Commission, pursuant to 49 U.S.C. § 11701, requesting the commencement of a declaratory order proceeding to the effect that the commission retained jurisdiction over rates exempted pursuant to 49 U.S.C. § 10505, and that such jurisdiction was exclusive. On March 5, 1986 the Commission, responding to the Conrail petition, stated that, despite Mr. Hardy's letter, 2/ it retained jurisdiction over exempted rates and that such unexercised jurisdiction preempted common law causes of action challenging such rates. Consolidated Rail Corporation -- Declaratory Order -- Exemption, 1 ICC 2d 895 (Feb. 27, 1987).

Armed with the Commissioner's ruling, and with the intervening decision in

Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd. of Mississippi, _____ U.S. _____, 106 S. Ct. 709 (1986), Conrail renewed its motion for summary judgment.

In Transcontinental the Supreme Court considered whether the states could impose conditions on the first sale of natural gas which, by direct statutory exemption, was placed beyond regulation by the Federal Energy Regulatory Commission (FERC). Prior to 1978 regulation by FERC preempted any state regulation. See Northern Natural Gas Co. v. State Corporation Comm'n of Kansas, 372 U.S. 84 (1963). In the Natural Gas Policy Act of 1978, Pub. L. 95-621, 92 Stat. 3351, Congress substantially restricted FERC's regulatory authority. The Transcontinental Court noted that a "decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive

force as a decision to regulate". 106 S. Ct. at 717 (citations omitted). The Court refused to accept the argument that Congress "in revising a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand, and the price of natural gas, intended to give the States the power it had denied FERC." Id.

A Second district judge to whom the renewed Conrail motion for summary judgment was assigned, found both the Commission's declaratory ruling and the Transcontinental Court's reasoning to be persuasive and granted summary judgment. The order granting summary judgment on the shipper's common law claims resulted in an appealable order because it disposed of all the remaining claims. See Fed.R.Civ.P. 54(b). This appeal followed. Since summary judgment was entered on all claims not voluntarily dismissed, our review is plenary.

II.

The shippers contend that the court erred in dismissing their statutory claims, in holding their common law claims to be preempted, and in dismissing their constitutional law claims. We address these contentions in that order.

A.

The shippers point out that under the Interstate Commerce Act a holder of a receipt or bill of lading is entitled to recover for the actual loss or injury to the property caused by the carrier. 49 U.S.C. § 11707(a)(1). They urge, as well, that this carrier's responsibility for loss or damage survives deregulation. See First Pennsylvania Bank v. Eastern Airlines, Inc., 731 F.2d 1113 (3d Cir. 1984). From these unquestionably sound premises the shippers urge the conclusion that an attempt to increase rates in an amount sufficient to cover the cost of processing, defending, and

paying damage claims must be illegal. This conclusion, however, does not follow from the premises. The summary judgment record establishes that some of the plaintiff shippers have filed and are litigating loss or damage claims against Conrail, pursuant to 49 U.S.C. § 11707, in appropriate state courts. Recovery in those pending actions, or in any subsequently filed, will not be affected by the tariffs here challenged. The shippers' statutory argument would be equally applicable to rates fixed by the Commission prior to deregulation, or to rates fixed under the 4 R Act and Staggers Rail Act for dominant non-exempt traffic. Yet the shippers cite no authority -- statutory, regulatory, or judicial -- for the proposition that carrier liability under section 11707 is not a cost which may be taken into account in fixing rates. The absence of such authority suggests the obvious: section 11707 prohibits rail

carriers from relieving themselves of the cost of paying loss or damage claims; it simply does not deal with what costs may be taken in account in determining rates. Indeed the 4 R Act, as amended by the Staggers Act, states specifically that "[n]othing in this subsection or section 11707...shall...give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707...." 49 U.S.C. §10505(e). Under the 4 R Act and the Staggers Act, levels or rates of service are to be determined primarily by competition in the marketplace for transportation services. Thus we agree with the district judges, both of whom rejected the claim that the challenged rates violated any relevant federal statute.

B.

On the motion for summary judgment we are obliged to accept as true the shippers'

contention that the surcharges imposed on their shipments resulted in tariffs higher than those being charged to some of their competitors. We accept, arguendo, their legal contention that at common law there were remedies against common carriers for discrimination in rates among shippers. After the enactment of the Interstate Commerce Act, however, rail shippers were no longer subject to such remedies. See Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) (no common law actions challenging rates established under the Interstate Commerce Act). See also Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) (state common law remedy imposing service requirements preempted by Interstate Commerce Act). From the time Abilene Cotton Oil was decided to date, no case has permitted a shipper to challenge a freight rate in a common law action. The shippers, however, discern in

the deregulation scheme of the 4 R Act and Staggers Act a Congressional intention to restore the common law authority of the state or federal courts, at least in cases in which the Commission has found commodities to be exempt.

Prior to 1976, railroads were required to file tariffs with the Commission and interested parties were able to challenge these rates. 49 U.S.C.A. §§ 1(5), 15 (1959) (amended 1976, repealed 1980). The authority of the Commission to exempt rates from challenge has its roots in the 4 R Act, which had a declared purpose of "permit[ting] railroads greater freedom to raise or lower rates for rail services in competitive markets." 45 U.S.C. § 801(b)(3)(1982). The exemption authority was a principal component of the Staggers Act, which furthered the policy of "allow[ing], to the maximum extent possible, competition and the demand for services to establish reasonable rates for

transportation by rail." 49 U.S.C. § 10101a(1) (1982). But while both the 4 R Act and Staggers Act decreased the Commissioner's role with respect to rate-making, neither their text nor their legislative history suggests a Congressional intention to resurrect common law remedies moribund since 1907. Indeed the Staggers Act expressly condified the holding of Abilene Cotton Oil, adding to the Interstate Commerce Act the provision:

> The jurisdiction of the Commission...over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practice of such carriers, is exclusive.

49 U.S.C. §10501(d)(1982). While this provision could be literally interpreted to mean that it is jurisdiction over provided remedies -- and not the remedies themselves

-- which are exclusive, the legislative history belies such an interpretation:

> The remedies available against rail carriers with respect to rail rates, classifications, rules and practices are exclusively those provided by the Interstate Commerce Act, as amended, and any other federal statutes which are not inconsistent with the Interstate Commerce Act. No state law or federal or state common law remedies are available.

H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 106, reprinted in 1980 U.S. Code Cong. & Admin. News 4110, 4138.

Since this statutory provision, as illuminated by legislative history, makes clear that the only remedies regarding rail rates are those provided by federal statutes, the savings clause, 49 U.S.C. § 10103 (1982), had no application to this case. The savings clause only states that "[e]xcept as

otherwise provided in this subtitle," common law remedies are cumulative. The explicit legislative intent that only federal statutory remedies exist is precisely the type of exception contemplated by the savings provision.

The shippers would have us apply the expressly preemptive provision in 49 U.S.C. § 10501(d) only in cases in which the Commission fixed rates, and not in cases where exercised its exemption authority. The only possible textual support for such an interpretation of the section is the literal reading rejected above.

Moreover, an interpretation which viewed exempted rates as removed from jurisdiction of the Commission would be inconsistent with the statutory scheme, which provides for the Commissioner's ongoing jurisdiction over exempt traffic. 49 U.S.C. § 10505(d) permits revocation by the Commission of exemption where necessary to carry out the

transportation policy of the Act. Congress determined that "there be continuing evaluation of the appropriateness of regulation and continuing deregulation where consistent with the Act's policies." Coal Exporters Ass'n of the United States, Inc. v. United States, 745 F.2d 76, 82(D.C. Cir. 1982), cert. denied, 471 U.S. 1072 (1985). The exemption shall be construed to affect our jurisdiction under section 10505 or our ability to enforce this decision..." 49 C.F.R. § 1039.10 (1986).

The ongoing jurisdiction to reconsider the exemption in light of competitive conditions is conferred in the first instance on the Commission, no on the courts. Recognition of a common law remedy with respect to rates would have the effect of substituting a court's regulation for the Commission's decision in favor of deregulation. In the 4 R Act and Staggers Act, Congress has decided in favor of

permitting railroads to fix their own rates, subject only to the regulation imposed by the competitive market, except in cases where in the judgment of the Commission, competitive forces do not operate effectively. Until the Commission determines in a section 10501(d) proceeding that Conrail is dominant over the plaintiff shippers' traffic in agricultural products this court cannot grant relief to the shippers. See Bessemer and lake Erie R.R. Co. v. ICC, 691 F.2d 1104 (3d Cir. 1982), cert denied sub nom., Western Coal Traffic League v United States, 462 U.S. 1110 91983). As the Commission noted in the Conrail Exemption Decision:

> If another body were allowed to replace the regulatory restrictions dismantled at the Commission, the agency's exemptive actions would be nugatory. Worse, the potential for variation and conflict among various decisionmakers could make the post-exemption regime

more restrictive of rail carriers than the one suspended by exemption.

Consolidated Rail Corporation -- Declaratory Order -- Exemption, 1 ICC 2d 895 (Feb. 27, 1987).

The Commission's analysis is consistent with that of the Supreme Court in the quite analogous context of deregulation of the natural gas industry. Transcontinental Gas Pipeline Corp. v. State Oil & Gas Board, ____ U.S. _____, 106 S.Ct. 709 (1986).3/ It is, moreover, consistent with that of other courts which have addressed the issue. See Alliance Shippers, Inc. v. Southern Pacific Transp. Co., No. 86-3837 (C.D. Cal. Nov. 19, 1986); Pittsburgh Terminal Corp. v. Baltimore & Ohio R.R., No. 84-1267 (N.D. Ohio Sept. 25, 1986). Thus we agree with the district court that the shippers' common law claims, whether considered as arising under state or federal common law, are preempted. Abilene Cotton Oil is still the controlling rule.

Judge Aldisert is concerned that our reading of the statute leave the shippers without a remedy for price discrimination. This argument ignores that the Commission, in granting the exemption, has determined that regulation is "not needed to protect shippers from abuse of market power." 49 U.S.C. § 10505(a)(2)(b).4/ The shippers' remedy for price discrimination is simple: it can choose to use other means of transportation. Congress and the Commission have determined that the market is adequate protection; it is not the place of this court to disagree with that determination. Even if the shippers could show that Congress and/or the Commission were wrong, this would not permit us to allow damages. Thus, while it may be that the Commission would not award damages for discriminatory prices charged during a period of exemption, an issue not decided here, we do not agree that this possibility requires a different result.

C.

The shippers' constitutional law claim is that by imposing discriminatory tariffs on their traffic, Conrail deprived them of property and liberty interests without due process of law. The first district judge to whom the case was assigned dismissed this claim on the theory that common law remedies were preserved by the Staggers Rail Act, and thus that there was a remedy, satisfying due process for any deprivation which may have occurred. Conrail contends that the shippers consented to this dismissal, and thus cannot now appeal it. The record, however, is sufficiently ambiguous with respect to any such consent that we deem it appropriate to address the merit of the contention.

Every court that has considered the matter has concluded that Conrail is not a governmental actor for purposes of constitutional analysis. See Morin v. Consolidated Rail Corp., 810 F.2d 720 (7th

Cir. 1987); Myron v. Consolidated Rail Corp., 752 F.2d 50 (2d Cir. 1985); Wenzer v. Consolidated Rail Corp., 464 F.Supp. 643 (E.D.Pa.), aff'd 612 F.2d 576 (ed Cir. 1979). While Conrail is subject to extensive government regulation, such regulation does not convert its conduct into governmental action for constitutional purposes. See Rendall-Baker v. Kohn, 457 U.S. 830, 841-42(1982). Thus we join those courts that have held expressly that Conrail is a private actor.

III.

The shippers' statutory, common law, and constitutional arguments all lack merit. The summary judgment appealed from will therefore be affirmed.

ALDISERT, Circuit Judge, dissenting.

What divides this court is a straightforward disagreement. We are not

fencing with glancing blows. Our divergent views meet a single controlling issue head on: Does federal law preempt state common law claims against rail carriers for discriminatory conducted practiced during the period in which the Interstate Commerce Commission, pursuant to the Staggers Rail Act of 1980, has exempted relevant rail traffic from regulation? The majority says common law remedies are preempted in these circumstances. I say they are not. Accordingly, I dissent and would reverse the judgment of the district court.

I.

I begin by stating certain universal precepts that govern this case. To decide a federal preemption issue to to determine Congressional intent. Wardair Canada, Inc. v. Florida Dep't of Revenue, _____U.S._____ (54 U.S.L.W. 4687, 4688, June 18, 1986). In the context of federal regulation of rail carriers, repeals of common law remedies by

implication are not favored: a statute will not be construed as taking away a common law right unless the right is so repugnant that it renders the statute's provisions nugatory. Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907). These precepts strongly influence my approach to this case. Therefore, I begin with an examination of Congressional intent.

II.

Congress enacted the Staggers Act of 1980, Pub. L. No. 96-448, 94 Stat. 1898, to dismantle the regulatory scheme established by the Interstate Commerce Act of 1887 (ICA). Influenced by nearly 100 years of railroad experience, Congress came to the conclusion that "[m]odernization of economic regulation of railroads, with greater reliance on the marketplace, is essential to achieve maximum utilization of railroads, to save energy and to combat inflaction." H. Conf. Rep. No. 1430 96th Cong., 2d Sess., reprinted in 1980

U.S. Code Cong. & Admin. News 4110, 4111. In overhauling the federal regulatory scheme, Congress desired "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. § 10101(a); see ICC v. Texas, ___U.S.___, ___ (55 U.S.L.W. 4129, 4132, Jan. 20, 1987); Consolidated Rail Corp. v. United States 812 F.2d 1444, 1449 (3d Cir. 1987).

In choosing to allow competition to play an important role in establishing rail rates, Congress granted the ICC authority to exempt from regulation categories of rail transportation when the Commission concluded that such regulation was not necessary to carry out the transportation policy as expressed in section 10101a. See U.S.C. § 10505. To "ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rules, practices, etc.," the Act "preempt[ed]

state authority over rail rates, classifications, rules and practices." H. Conf. Rep. No. 1430, reprinted in 1980 U.S. Code Cong. & Admin. News at 4138.

Congress, however, also expressed the desire "to prohibit unlawful discrimination." 49 U.S.C. § 10101a(13). With respect to the existence of common law claims, Congress amended 49 U.S.C. § 10103 to state:

> Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law.

Thus, two conclusions are inescapable: where there is no federal regulation of rates because of the promulgation of exemptions, (1) no state may fill the void by imposing regulation of its; and (2) common law remedies are available inter alia to prohibit unlawful discrimination.

A.

It cannot be denied that prior to the enactment of the ICA and ICC, several states recognized a common law action on behalf of a shipper against a railroad for discriminatory conduct practiced by the carrier. In Messenger v. Pennsylvania R.R. Co., 37 N.J.L. 531 (1874), the New Jersey Court of Errors and Appeals determined that railroads by virtue of their common carrier status are bound to use their franchise with fairness and for the common good. "A common carrier owes an equal duty to all and it cannot be discharged if he is allowed to make unequal preferences, and thereby prevent or impair the enjoyment of the common right...." Id. at 535. The court noted that a railroad contract that gave to certain persons an exclusive advantage over all other transporters in the transportation of goods was unjust and could not be legally enforced. "For a like service, the public are entitle to a like price." Id. at 536.

In McDuffee v. Portland and Rochester R.R., 52 N.H. 430 91873), the Supreme Judicial Court of New Hampshire recognized that a rail carrier's service is a common as well as a public right, belonging to every individual as well as to the state. The court then stated:

> The commonness of the right necessarily implies an equality of right, in the sense of freedom from unreasonable discrimination; and any practical invasion of the common right by an unreasonable discrimination practiced by a carrier held to the common service, is insubordination and mutiny, for which he is liable, to the extent of the damage inflicted, in an action of case at common law.

Id., at 450; see also 2 J. Kent, Commentaries on American Law 983 (Holmes ed. 1896) ("Even at common law carrier is bound to make only reasonable charges, and perhaps

there is a further obligation not to charge two persons differently for exactly the same service."). The common law right of the shipper to be free from unjust discrimination at the hands of a rail carrier has roots in English law. In London & N.W. Ry. Co. v. Evershed, 3 App. Cas. 1029, 1035 (House of Lords 1878), Lord Chancellor Cairns stated that "[t]he one right, to my mind, the clear and undoubted right, of a public trader is to see that he is receiving from a railway company equal treatment with other traders of the same kind doing the same business and supplying the same traffic." It bears emphasis that these cases and holdings were decided in an era that preceded the imposition of federal railroad regulation.

B.

Our inquiry, then, must follow a very narrow compass: if common law remedies were preempted when and because the ICC assumed regulation of the railroad industry, are they

still preempted when the ICC abdicates its regulation by promulgating an exemption? To ask this question is also to answer it, yet the answer seems best expressed by Karl Llewellyn:

> [T]he rule follows where its reason leads; where the reason stops, there stops the rule.

K. Llewellyn, The Bramble Bush 157-58 (1960). The reason for the rule of federal preemption was the interposition of federal regulation. When that regulation disappears, the reason for preemption must fall with it. I think Congress intended precisely that. Both the language and scheme of the Staggers Act compel this conclusion.

III.

Regulated rail carriers subject to the jurisdiction of the ICC are generally prohibited from unreasonably discriminating between shippers when providing substantially the same service. See 49 U.S.C. § 10741. An

aggrieved shipper may seek relief from unreasonable discrimination by filing a complaint with the Commission pursuant to 49 U .S.C. § 11701. When the ICC exempts a field of rail transportation from regulation, however, the prohibitions of section 10741 do not apply to deregulated carriers because their traffic is no longer subject to the jurisdiction of the ICC. See 49 U.S.C. § 10741. Yet, in light of Congress' policy "to prohibit unlawful discrimination," 49 U.S.C. § 10101a(13), it seems to me that Congress did not intend to leave shippers without a remedy for discriminatory conduct practiced by rail carriers exempted from regulation. A common law action would provide such a remedy. And Congress expressly anticipated this under the savings clause of the Staggers Act, 49 U.S.C. § 10103.

IV.

A remedy is a procedure that gives to one who has been hurt, by another's violation

of an obligation imposed by contract or by law, a right to seek actual or substituted redress. A remedy does not guarantee redress, but does guarantee the opportunity to seek it. Conrail's interpretation of the Staggers Act falls woefully short of providing a shipper with a remedy. Under the most generous view of Conrail's argument, the shipper never has an absolute right to be heard on the merits. At the very least, the shipper is only given the right to petition the ICC to withdraw its exemption and restore regulation of the entire railroad industry's transportation of potatoes. A proceeding to restore regulation of the entire railroad industry is not the mirror image of a proceeding to prove discrimination against a particular potato shipper by a particular carrier. The jargon of produce is especially apt here: you cannot compare the apples of an application to impose industry-wide

regulation with the oranges of a claim by one shipper against one railroad for one product.

Thus, the possibility that the ICC, under 49 U.S.C. § 10505(d), may revoke a previously-issued exemption and reimpose regulation does not, as Conrail contends, guarantee an "after the fact" remedy to address the accused discrimination here. In petitioning the ICC to revoke an applicable exemption, the shipper would first have to overcome the slated Congressional goals "to minimize the need for Federal regulatory control over the rail transportation system" and "to promote a safe and efficient rail transportation system." 49 U.S.C. § 10101a(2), (3). Although Staggers invests the ICC with discretion to restore regulatory control, the proceedings before the Commission would not take place in a judicially-neutral ambience; the petitioner would have the very high burden of overcoming the legislatively-declared public policy of

minimal Federal regulatory control. Should the ICC follow its previous decision respecting and reflecting that Congressional policy, the shipper would never have a right to be heard anywhere on its charge of discrimination. I do not think Congress intended such a draconian denial of a remedy, especially under a statute that specifically provides for "remedies...at common law." 49 U.S.C. § 10103.

But let us assume the best case scenario under Conrail's theory of an exclusive statutory remedy. That best case would not afford complete redress to the shipper. Even if the exemption were revoked and new regulatory controls were instituted in futuro, there is no apparent vehicle to provide retroactive relief, a relief that seems mandatory here if primitive notions of justice are to be served. The ICC would have no power to award damages for discriminatory rates charged by rail carriers during the

interim exemption period, because the prohibitions of section 10741 do not apply to carrier not subject to the jurisdiction of the ICC. This is the black hole in Conrail's theory. I simply cannot believe that Congress intended to deny such relief to victims of discrimination.

I do not accept a statutory construction that dictates that shippers, like G & T, are denied an adequate remedy for a carrier's unfair conduct during an exemption period, or an interpretation that would require shippers to seek alternate and obviously more expensive means of shipping, such as motor or air freight. When it is considered that shippers could be damaged irreparably or forced to dissolve their businesses because of this lack of a remedy, it becomes obvious that Congress intended no such outrage. Conrail's "after the fact" remedy is in truth no remedy.

I think that the statute means only this: as long as shippers have access to the ICC to seek redress under section 10741 for a carrier's discriminatory conduct because either the ICC still regulates the rail transportation involved or has abrogated an applicable exemption, the shipper has no common law remedy; the shipper must go to the ICC and not the courts. But where, as here, the Commission has surrendered its jurisdiction over a field of rail transportation by granting an exemption pursuant to the Staggers Act, a common law remedy exists under the savings clause of the Act to remedy unlawful discrimination practiced by rail carriers during the exemption period. See First Pa. Bank v. Eastern Airlines, Inc., 731 F.2d 1113, 1120 (3d Cir. 1984) (deregulation stripping the Civil Aeronautics Board of its powers left the courts "free to proceed without circuity to apply directly the familiar federal common

law rules relating to the subject matter or released value rates"). Although I believe the foregoing is sufficient to justify the reversal of the district court's judgment, I nevertheless will address other arguments presented to us.

V.

Conrail's argument that the teaching of Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907), precludes recourse to common law is a contention that warrants analysis. The centerpiece of this allegation is that the presence of a common remedy would conflict with the federal regulatory scheme, creating a lack of uniformity from state to state. See Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd., ___U.S.___(54 U.S.L.W. 4114, 4118, Jan. 22, 1986) (preemption analysis should consider whether state regulation would disrupt the federal regulatory scheme); Louisiana Pub. Serv. Comm'n, ___U.S. at___. 54 U.S.L.W. at 4509

(preemption occurs when there is an outright or actual conflict between federal and state law). I have two responses to Conrail's argument.

First, a common law remedy for a deregulated rail carrier's discriminatory conduct will not conflict with the ICC's authority under 49 U.S.C. § 10741 to proscribe such conduct -- or with the Commission's power under 49 U.S.C. § 10701a to determine the reasonableness of a rate charged by a carrier -- because the common law remedy will exist only when an ICC exemption for the relevant traffic remains in effect. In Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976), the Court permitted plaintiff's common law claims against an air carrier to go forward without requiring the plaintiff to first present them to the Civil Aeronautics Board for determination. In noting that there was no irreconcilable conflict between the relevant

Act's regulatory scheme and the common law remedy, the Court distinguished Abilene in language notably applicable to the present case:

> In Abilene the carrier, if subject to both agency and court sanctions, would be put in an untenable position when the agency and a court disagreed on the reasonableness of a rate. The carrier could not abide by the rate filed with the Commission, as require by statute, and also comply with a court's determination that the rate was excessive. The conflict between the court's common-law authority and the agency's ratemaking power was direct and unambiguous. The court in the present case, in contrast, is not called upon to substitute its judgment for the agency's on the reasonableness of any carrier practice.

Id. at 299-300 (emphasis supplied).

Similarly, there is no irreconciliable conflict between a common law remedy here and the ICC's jurisdiction as provided by Congress. Because the common law action is available only when the ICC surrenders its jurisdiction over the relevant traffic by granting an exemption, the courts will not substitute their judgment for that of the agency's on the reasonableness of any carrier practice. As contemplated by the savings clause of the Staggers Act, 49 U.S.C. § 10103, a common law remedy may coexist with the role of the ICC in regulating rail transportation.

If the ICC subsequently determines that rail carriers are abusing an exemption or that common law actions are advancing results inconsistent with the national transportation policy as expressed in 49 U.S.C. § 10101a, the Commission can revoke the exemption and reimpose regulation on the relevant rail traffic. See 49 U.S.C. § 10505(d). In this

event, common law actions initiated after the exemption has been revoked would be preempted as inconsistent with the federal regulatory scheme. Abilene, 204 U.S. at 446. But where the ICC has surrendered its regulatory jurisdiction, common law actions survive to provide a remedy to shippers injured by unjust discrimination at the hands of a rail carrier.

Conrail's argument also blurs the distinction between regulation of rail rates and adjudication of a tort between two parties. Citing Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd., ___U.S.___ (54 U.SLW. 4114 Jan. 21, 1986), Conrail contends that recognizing a common law action for discriminatory rates would amount to de facto regulation of rail carriers. Conrail's reliance upon Transcontinental does not withstand analysis.

In Transcontinental, the Court decided whether state regulation was preempted by the

deregulation of natural gas under the Natural Gas Policy Act of 1978. The Court did not consider whether the deregulated industry was freed from the obligations imposed by common law. Furthermore, the policy concerns of Transcontinental do not apply to the case at bar because courts adjudicate -- they do not regulate. The power to regulate involves the power to develop legislatively-created standards and maxims before a dispute arises and to set rates and rules to be followed in the future. By contrast, the judicial exercise attempts to do justice between two parties in the limited context of a dispute that has already occurred. In the present case, the district court was called upon to adjudicate a tort claim filed by a shipper against a rail carrier for a discriminatory surcharge imposed on past shipments. As aptly stated by Professor Dworkin:

> [J]udges, neither should be nor are

> deputy legislators, and the familiar assumption, that when they go beyond political decisions already made by someone else they are legislating, is misleading. It misses the importance of a fundamental distinction...between argument of principle on the one hand and arguments of policy on the other.

Dworkin, Hard Cases, 88 Harv. L. Rev. 1057,d 1-58-62 (1975).

A decision by Congress that an area is best left unregulated takes away the regulatory authority of both federal and state regulatory agencies. See Transcontinental, ___U.S. at___, 54 U.S.L.W. at 4118; Illinois Comm. Comm'n v. ICC, 749 F.2d 875, 877-78 (D.C. Cir. 1984), cert. denied, ___U.S.___ (54 U.S.L.W. 3223, Oct. 8, 1985). But I refuse to make the quantum leap from there to a conclusion that Congress has also closed the door to all judicial remedies when deregulation sets in. In enacting the

Staggers Act, Congress did not intend to emasculate a body of common law, specifically contemplated by the savings clause of the Act, that was designed to remedy the discriminatory conduct Congress clearly intended to prevent. If Congress had intended to remove the common law remedy, it would have done so plainly and said so clearly.

IV.

For the reasons presented, I would reverse the district court's grant of summary judgment.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

2. The Commission explained that Mr. Hardy's informal letter response was not binding on the agency. Consolidated Rail Corporation-Declaratory Order-Exemption, 1 ICC 2d 895 (Feb. 27, 1986)

3. Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976), on which the shippers rely, is not helpful to them. In that case, the tort remedy could be utilized without intruding upon any judgment of the regulatory agency. Here, recognition of a tort remedy for discriminatory rates would involve case-by-case judicial regulation of rates in the face of a decision by a regulatory agency, acting pursuant to Congressional directives, that the market is sufficiently competitive that no regulation of rates is necessary. Surely it cannot be said here, as it was in Nader, that "any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would be merely incidental." 426 U.S. at 300.

4. The alternative basis for an exemption, where the Commission determines that the transaction or service is of limited scope, 49 U.S.C. § 10505(a)(2)(A), is not involved in this case.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5897

G. & T. TERMINAL PACKAGING CO., INC.
and ANTHONY SPINALE,
Appellants

v.

CONSOLIDATED RAIL CORPORATION

September 23, 1987

TO: David J. Goldberg, Esq.
David H. Baker, Esq.
Laurence Z. Shiekman, Esq.
*
Kenneth P. Kolson, Esq.
William J. Hanlon, Esq.

NOTICE OF JUDGMENT

This Court's opinion was filed and Judgment was entered today in case No. 86-5897 and copies are enclosed herewith.

* * *

Sally Mrvos, Clerk

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 86-5897
G. & T. TERMINAL PACKAGING CO., INC.
and ANTHONY SPINALE,
Appellants
v.
CONSOLIDATED RAIL CORPORATION

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA and ALDISERT, Circuit Judges

The petition for rehearing filed by above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

DATED: October 22, 1987

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

G. & T. Terminal Packaging Co., Inc. and Anthony Spinale v. Consolidated Rail Corporation
Civil Action No. 84-1173

October 23, 1986
LETTER-OPINION OF HON. ALFRED J. LECHNER, JR.

Plaintiffs are engaged in the business of shipping agricultural goods by railroad. They commenced this action in 1984 seeking recovery of allegedly discriminatory rates paid by plaintiffs to defendant railroad company, and an injunction against future discriminatory rates. Judge Ackerman has previously dismissed all counts of the complaint except thos aggeging a common law cause of action against defendant. 1 Presently two motions are before the Court: (1) defendant's motion to dismiss the reamining common law claim and (2) plaintiffs' motions to restore two counts of the complaint asserting that defendant's allegedly discriminatory rates were

designed to unlawfully inhibit plaintiffs from pursuing legal remedies for shipped goods lost or damaged by defendant railroad company.

Facts

G. & T. Terminal Packaging Co., Inc. ("G & T") is a New York corporation engaged in the business of shipping potatoes from the west coast to the New York City area. Anthony Spinale ("Spinale") is President and sole stockholder of G & T. Consolidated Rail Corporation ("Conrail") is a Pennsylvania corporation engaged in the railroad business.

It appears that since at least 1983, Conrail has delivered G & T's potatoes from the west coast to G & T's terminals located in Kingsbridge and Hunts Point New York. G & T alleges that in June, 1983, Conrail imposed an additional freight charge for transportation of G & T's potatoes which caused the rate charged G & T to exeed the rate charged other comparable shippers by

some $500 to $600 per carload of potatoes. G & T has objected to the additional charges but Conrail has refused to reduce them.

By letter, dated September 30, 1983, counsel for G & T wrote to the chairman of the Interstate Commerce Commission ("ICC") to inquire whether the ICC had jurisdiction to entertain a legal action brought by G & T against Conrail challenging the allegedly discriminatory rates. By letter, dated October 11, 1983, the Director of the ICC's Office of Proceedings responded to the inquiry and indicated that because the ICC has exempted railroad carriers of fresh fruits and vegetables from virtually all previous forms of economic regulation (see discussion, infra) the ICC would not have jurisdiction to entertain G & T's suit. The letter indicated G & T would have to seek relief in the courts.

By compliant filed with this Court on March 26, 1984, G & T commenced this action

asserting that Conrail's allegedly discriminatory rates violated provisions of the Interstate Commerce Act, 49 U.S.C. § 10101 et seq. (the "Act"), the common opinions issued at hearings held on September 28, 1984 and April 8, 1985, Judge Ackerman dismissed G & T's claims under the Act and the Constitution and expressly ruled that G & T could assert its common law claims against Conrail in this Court. By stipulation of the parties filed January 2, 1985, G & T's antitrust claims were dismissed. Thus, the only cause of action remaining ~~in this~~ action is based on common law claim of rate discrimination.

It appears that on September 27, 1985, Conrail filed a petition with the ICC seeking a declaratory judgment that G & T's common law remedies in this action were pre-empted by provisions of the Act. On March 5, 1986, the ICC issued a decision concluding, contrary to its October 11, 1983 letter, that

it retained jurisdiction over all allegations of rate discrimination (the "March 5, 1986 Decision"). In addition, the ICC ruled that under its interpretation of the Act, G & T had no independent common law cause of action against Conrail.

Citing the ICC decision and a recent Supreme Court case, Conrail brings the present motion for summary judgment dismissing G & T's remaining common law claim. G & T has opposed Conrail's motion and has moved the Court to restore two counts of the complaint which Judge Ackerman previously dismissed. These two counts arise under provisions of the Act forbidding common carriers from taking steps to evade liability for damage suffered by goods shipped. G & T has submitted documents and evidence uncovered during the course of discovery in support of its claim that Conrail raised G & T's rates to inhibit G & T from pursuing

liability claims against Conrail for damaged goods.

Regulatory Framework

Originally enacted by Congress in 1887, the Interstate Commerce Act is the basic legislation governing Federal regulation of common carriers. One of the core regulatory functions of the Act is to provide a mechanism for establishing the rates common carriers are allowed to charge shippers using the carriers. The original act required the ICC to determine "just the reasonable charges," either in response to complaints of discriminatory or unreasonable rates filed by shippers against carriers, or in response to carrier requests for rate increases. See H. Rep. No. 1035, 96yh Cong., 2d Sess. Appendix, reprinted in 1980 U.S. Code Cong. & Ad. News 3978, 4025, 4029-31.

The Act was amended by the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1898, in which Congress made plain its intention

that the railroad industry be significantly deregulated. The policy subsection of the Staggers Act states:

> In regulating the rairoad industry, it is the policy of the United States Government--
>
> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required.
>
> * * *
>
> (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail

carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital ....

49 U.S.C. §10101a.

Several other provisions of the Staggers Rail Act are relevant to the instant motions. With respect to the survival of a common law claim, 49 U.S.C. § 10103 provides: "Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in

addition to remedies existing under another law or at common law." The Act establishes that the general jurisdiction of the ICC over railroad carrier transportation issues, however, is exclusive: "The jurisdiction of the [ICC] ... over transportation by rail carriers, and the remedies provded in this title with respect to the rates, classifications, rules and practices of such carriers, is exclusive." 49 U.S.C. § 10501(d).

One provision of the Staggers Act, critical to the case at bar, directs the ICC to exempt a classification or service of rail transportation from regulation under the Act where the ICC has determined that regulation "(1) is not necessary to carry out the transportation policy of section 10101a of this title; and (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers

from the abuse of market power." 49 U.S.C. § 10505(a). The exemption provision further asserts the ICC may revoke, in whole or in part, an exemption which is determined to cause effects contrary to the stated policy of the Act: "The Commission may revoke an exemption, the the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title." 49 U.S.C. § 10505(d). The Staggers Rail Act's exemption provision also states that an ICC exemption does not relieve a rail carrier from its obligations to provide contractual liability for damaged or lost goods to its carriers

2 or to protect the interests of its employees. 49 U.S.C. § 10505(e), (g).

Heeding this Congressional deregulatory mandate, the ICC, in a decision dated

February 17, 1983, exempted rail transportation of agricultural commodities, including potatoes, from regulation under the Act. See Rail General Exemption Authority -- Miscellaneous Agricultural Commodities, 367 I.C.C. 298 (1983) (hereinafter referred to as "ICC Exemption Decision"). The ICC Exemption Decision asserts:

> ...continued regulation of those commodities no longer appeared necessary to serve the Nation's transportation policy objectives or to protect shippers from abuse of market power by the railroads. Analysis showed that the distribution of these commodities was characterized by one or more of the following: (1) precipitously declining market shares, (2) the availability of unregulated motor carrier alternatives; or (3) the limited nature of the remaining rail transportation.

Id. at 298. The opinion explains the exemption will ehnhance the competitiveness of railroads in the overall transportation industry and that "the record in this case in adequate to demonstrate that sufficient actual or potential competition exists in the movement of each of the exempted commodities to insure against abuse by the railroads." Id. at 300. The decision further asserts "if the railroads are shown to be abusing their market power (a highly unlikely event), then the Commission can revoke the exemption and reimpose regulation." Id. at 303.

Discussion

From a procedural standpoint, the motions now before this Court seek reconsideration of issues already decided on prior motions for summary judgment. The Federal Rules of Civil Procedure appear to allow for such review at the discretion of the Court and "upon such terms as are just." Fed. R. Civ. P. 60(b). Where there has been

an intervening change in arguably controlling law, reconsideration of the Court's earlier decisions is appropriate and serves interests of equity and judicial economy. See Max M. v. Thompson, 585 F. Supp. 317, 321 (N.D. Ill. 1984).

The parties each claim the ICC Exemption Decision constitutes a shift in the underlying legal framework of this action, sufficient to warrant reconsideration of this Court's prior findings. In addition, Conrail proffers a Supreme Court case decided subsequent to this Court's prior rulings, as controlling precedent warranting reconsideration of this Court's decision on the common law claim. Because this Court's prior rulings were based, at least in part, on the ICC letter disclaiming ICC jurisdiction over this claim of rate discrimination, the ICC's subsequent unanimous declaratory judgment that the ICC does retain jurisdiction over G & T's claim

appears to present sufficient justification warranting reconsideration of this Court's prior decisions.

In these motions the parties are asking the Court to make legal determinations as to the Court's jurisdiction over this matter and the propriety of certain claims in this action. When a court is asked to resolve questions of controlling or applicable law, such questions are properly before the Court on motion for summary judgment. See Paton v. LaPrade, 469 F. Supp. 774, 779 (D.N.J. 1978). The motions are considered in turn.

A. Conrail's Motion to Dismiss the Common Law Claim

Conrail's position in seeking dismissal of plaintiffs' common law claim against allegedly discriminatory rates is straightforward. Conrail contends that under the plain terms of the Act, and as interpreted for close to 100 years, the ICC has had and continues to have sole

jurisdiction to entertain shippers' claims of unfair or discriminatory rates against carriers. Conrail argues that when the ICC issued its decision exempting carriers of certain agricultural products, the ICC had no intention of resurrecting common law claims, assertable in courts, against allegedly unfair or discriminatory rates. To buttress this point, Conrail points to the ICC;s declaratory judgment issued March 5, 1985. Futhermore, argues Conrail, when Congress authorized the ICC to exempt from regulation certain forms of transportation, Congress did not intend to allow for the introduction of "indirect" regulation of the railroads by the courts through common law interpretation. Rather, says Conrail, both Congress and the ICC anticipated 91) that competition in the transportation industry would prevent unfair rates from occurring, and (2) that claims of unfair or discriminatory rates should be

addressed by the ICC, as warranted, by partial or total revocation of exemptions.

G & T's position that it retains its common law right to protest discriminatory rates in court is equally straightforward. G & T points out that prior to the ICC Exemption Decision, individual shippers were provided with a forum, the ICC, at which their grievances against unfair rates could be heard. When Congress gave the ICC its exemption authority, G & T asserts, Congress did not intend to leave individual shippers without remedy against discriminatory rates. Congress, says G & T, was concerned with unfettering rail carriers from restrictive and unwarranted administrative regulation, not with protecting carriers from individualized common law claims asserted by way of court adjudication. G & T claims that because the burden for obtaining revocation of an ICC exemption is difficult to meet, acceptance of Conrail's position effectively

rorecloses individual shippers from any forum for asserting discriminatory rate claims against carriers. Such a result, G & T submits, was clearly unintended by Congress when it passed the Staggers Rail Act.

The issue before the Court, therefore, amounts to a determination of Congressional intent: Whether Congress intended that railroad shippers who believe they are being charged discriminatory rates by common carriers exempted from regulation are entitled to seek relief in courts, based on common law claims, or only before the ICC, by persuading the ICC that na outstnading exemption is being abused in a manner unanticiapted or unintended by the ICC and Congress. The issue is not clearly resolved by reference to the language of the statute. 49 U.S.C. § 10103 provides that, "except as otherwise provided, the remedies set forth in the Act are in addition to other statutory and common law remedies." Yet 49 U.S.C. §

10501(d) specificies that the ICC retains exclusive jurisdiction over rail transportation generally and, more specifically, the remedies with respect to rates and practices set by railroad carriers of agricultural products from regulation, the ICC exempted carriers of agricultural products from regulation, the ICC entertained exclusive jurisdiction and authority over questions such as the one now before this Court. But the parties do dispute, and on the face of the statute it is simply unclear, how Congress intended rate discrimination charges to be aired once the ICC had exempted a classification of rail transportation from regulation.

Although the legislative history to the Staggers Rail Act does not decisively settle the issue before the Court, the history is clear that Congress' intent in this amendment to the Act was to allow a wide degree of economic freedom to those forms of

transportation exempted by the ICC from regulation. As stated in the Conference Report: "[M]any of the government regulations affecting railroads have become unnecessary and inefficient. ... Modernization of economic regulation of railroads, with greater reliance on the marketplace, is essential to acheive maximum utilization of railroads....." H. Conf. Rep. No. 1430, 96th Cong. 2d Sess., reprinted in 1980 U.S. Code Cong. & Ad. News 4110, 4111. The history suggests that when considering the exemption provision of the Act, Congress specifically recobnized the possibility of abuse on the part of exempt carriers. The history indicates, however, Congress felt the benefits of deregulation outweighed the potential abuses and that such abuses would be minimized by effective competition in the transportation industry, or else remedied by appropriate ICC action. As stated in the Conference Report:

> The conferees anticipate that through the exemption process the Commission will eventually reduce its exercise of authority to instances where regulation is necessary to protect against abuses of market power where other federal remedies are inadequate for this purpose. Particularly, the conferees expect that as many as possible of the Commissions' restrictions on changes in prices and services by rail carriers will be removed and that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power.

Id. at 4137.

The Conference Report proceeds to emphasize the exclusive nature of the remedies provided by the Staggers Rail Act, and its preemption of potential federal or state common law remedies:

> The remedies available against rail carriers with respect to rail rates, classifications, rules and practices are exclusively those provided by the Interstate Commerce Act, as amended, and any other federal statutes which are not inconsistent with the Interstate Commerce Act. No state law or federal or state common law remedies are available.

Id. at 4138. Clearly the Act provides the exclusive mechanism for addressing claims of discriminatory rates, at least prior to an ICC decision exemption a class of rail transportation from regulation. Even after an ICC exemption decision, however, a strong implication to be drawn from the legislative history is that Congress recognized the potential for just the sort of abuses alleged in this case, and expected the ICC to address such abuses by reviewing the propriety of the

exemption in question in whole or in part after the emergence of such abuse.

The legislative history evidences that opponents of the Staggers Rail Act were concerned about the potential problem that railroads would abuse their monopoly position at the expense of small or "trapped" shippers. Certain Congressmen noted "the bill deregulates rates in many cases where competition is not abailable to protect shippers and consumers from excessive rate increases. ...We believe the House of Representatives should carefully review the momentous and dangerous decision made by the Committee to move deregulation... into the area where railroads enjoy a virtual monopoly position. This is an invitation to the railroads to abuse their market power." Id. at 4094, 4099. While these concerns may have been well-founded, the previously cited language from the Conference report submitted in support of the Staggers Rail Act indicates

supporters of the legislation considered these potentials for abuse could be effectively dealt with by the ICC.

G & T urges, as interpretation of the legislative history, that Congress fully intended to protect individual shippers from abuse by retaining traditional common law protections. G & T points to the statements of Senator Exon during floor debates of the Staggers Rail Act in which the Senator indicated the legislation contained adequate protection for smaller or captive shippers: "All of the protections in the Senate bill as passed on April 1 of this year are contained in the conference agreement. The include discrimination protection, the common carrier obligation, car limitation provision, and the contract rate advisory service for shippers of agricultural, forest, and paper product." Yet these protections were all specifically built into the Staggers Rail Act and were to be enforced by the ICC. There is simply no

basis for claiming Congress intended these protections be maintained and enforced independently by the courts. See e.g., 49 U.S.C. 10701 (rates must be reasonable); 49 U.S.C. § 11101 (common carrier may not discriminate as to rates or service among similar shippers). The legislative history establishes no more than that Congress expected the legislation to acheive the goals of deregulation with a minimal amount of abuse; such abuse was to be addressed by the ICC.

While no court has squarely addressed the issue now before this Court, decisions in sufficiently analogous situations bolster the conclusion that the Congressional intent behind the Staggers Rail Act was to have the Icc monitor both the deregulation of the railroad industry and the inevitable abuses springing from that deregulation. As a preliminary matter, the Supreme Court has stated that the courts should excercise

restraint in reviewing aspects of national transportation policy, as established by or delegated to the ICC: "Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems. ...It is not for us [the Court] to tinker with" one element of that national policy. Board of Trade v. United States, 314 U.S. 534, 546, 548 (1942). The Supreme Court has, more recently, emphasized the importance of allowing the ICC to handle issues involving the regulation of carrier rates. In reversing a Court of Appeals decision interfering with the ICC' authority over carrier rates, the Supreme Court stated: "[The Court of Appeals' action] undermines the Commission's ability to exercise the primary jurisdiction delegated to it by Congress to insure equitable and uniform rates." Burlington

Northern Inc. v. Unites States, 459 U.S. 131, 142 (1982). Although these cases arose prior to the ICC's invocation of its exemption power, they demonstrate a longstanding recognition that maintenance and enhancement of national transportation policy has long been properly within the immediate jurisdiction of the ICC.

The Supreme Court's decision in Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd., 106 S. Ct. 709 (1986) ("Transco"), while not directly on point, provides some insight as to policies courts should consider in determining Congressional intent where Congress has authorized deregulation in a previously highly regulated field. The case required a judicial determination of Congressional intent behind enactment of the National Gas Policy Act of 1978, 15 U.S.C. § 3301 et seq., a statute which in part revoked the power of the Federal Energy Regulatory Commission ("FERC")

to regulate aspects of sales of natural gas. The case arose as a challenge to a Mississippi State Gas and Oil Board ("Board") order. The order required a purchaser of natural gas from a single source that had several producers to purchase gas without discrimination in favor of any one producer of the source's gas. The state courts had affirmed the Board order, holding that when Congress determined to preclude federal regulation over such sales of natural gas, it did not intend to preempt state regulation over such sales of natural gas.

The Supreme Court reversed the state courts, holding that when Congress decided to curb federal regulation, thereby giving "market forces a more significant role in determining the supply, the demand, and the price of natural gas," Congress did not intent "to give the states the power it had denied FERC." Id. at 717. Although the decision is arguably not controlling insofar

as it involved review of a decision of a state's regulatory authority rather than review of a court invoking common law principles, several related underlying concerns raised by Justice Blackmun in the opinion appear to have general applicability to the case at hand.

One such concern was whether allowing state regulation (in the case at bar this concern would be with judicial intervention via common law) in an area Congress intended to relieve of federal regulation would conflict with the underlying Federal interest in deregulation. A second inquiry was whether Congress intended to give states (in the case at bar this concern would be with the courts) regulatory authority Congress had denied to Federal authorities. A related concern was whether permitting the state (in the case at bar, the courts) to regulate where Federal authorities could not, would disrupt the uniformity of the Federal

regulatory scheme. Id. at 717-18. Deciiding that each of these concerns warranted against allowing the states to step in where Congress had caused the federal authority to step out, the Court held: "In light of Congress' intent to move toward a less-regulated natural gas market, its decision to remove jurisdiction from FERC cannot be interpreted as an invitation to the States to impose additional regulations." Id. at 717.

Each of the concerns raised in Transco is applicable to the case at bar. Recognizing a judicial common law cause of action for discriminatory rates would in effect give license to de facto judicial regulation over common carrier rates. This is regulation that Congress, through the ICC, has decided is unnecessary at least until it appears the ensuing abuses cannot otherwise be curbed. Certainly permiting adjudication of discriminatory rate claims would interfere with the Congressional intention that abuses

flowing from deregulation be uniformly corrected, as those abuses surface, by ICC corrective action. Although it is true by definition adjudication is a legal process distinct from administrative regulation, in terms of practical application the inevitable effects of adjudication may not be so distinct. As the Supreme Court pointed out in Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 326 (1981): "A system under which each State could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act."

The problems arising when various state and Federal bodies and courts become involved in reviewing issues such as the one now before this Court, were aptly pointed out in W.D. Lawson & Co. v. Penn Central Co., 456 F.

2d 419 (6th Cir. 1972). That case involved common law and statutory claims arising from the destruction of property shipped by the defendant railroad. In ruling that the plaintiff's common law claims and been pre-empted by Federal statutory remedies, the court quoted the Supreme Court's decision in Adams Express Co. v. Croninger, 226 U.S. 491 (1913):

> 'Some States allowed carriers to exempt themselves from all or a part of the common-law liability, by rule, regulation, or contract; others did not; the Federal courts sitting in the various States were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from liability in another; hence this branch of interstate commerce was being subjected to such a diversity of legilative and judicial holding that it was practicly

> impossible for a shipper engaged in a business that extended beyond the confines of his own State, or for a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes, with but little certainty, what would be the carrier's actual responsiblity as to goods delivered to it for transportation from one State to another.' Quoting, Southern Pacific Co. v. Crenshaw [Bros.], 5 Ga. App. 675, 687, 63 S.E. Rep. 865.

W. D. Lawson, 456 F. 2d at 422. Given the legislative history to the Staggers Rail Act previously cited, it cannot be said Congress intended to return to a state-by-state regulatory scheme by reintroducing common law remedies fro allegedly discriminatory rates.

Although the March 5, 1986 Decision is not binding on this Court, its views on the scope of its jurisdiction under the Act are

entitled to due respect. See Blum v. Bacon, 457 U.S. 132, 141 (1982). The ICC's conclusions support the position that Congress intended, and the ICC understand Congress to have intended, that even after the ICC had invoked its exemption authority to deregulate a segment of the railroad industry, the ICC remained the principal authority responsible for interpreting and applying national transportation policy. As pointed out by the ICC: "If another body were allowed to replace the regulatory restrictions dismantled at the Commission, the agency's exemptive actions would be nugatory. Worse, the potential for variation and conflict among various decisionmakers could made the post-exemption regime more restrictive of rail carriers than the one suspended by the exemption." March 5, 1986 Decision at 5. The ICC's point is well taken. If aggrieved shippers could resort to the courts for relief from discriminatory

rates resulting from abuses under the deregulatory scheme, the ICC may never have an opportunity to review such abuses and address them. Such a result is clearly contrary to the evident Congressional intent behind the ICC's exemption-revocation authority.

G & T cites to Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976), as support for its position that common law remedies remain available to aggrieved shippers despite the presence of an arguably controlling preclusive regulatory scheme. In Nader, the plaintiff had been "bumped" from an airline flight, despite his confirmed reservation. The plaintiff asserted common law tort claims and statutory claims against the airline. The Court of Appeals ruled, inter alia, the District Court should have withheld decision on the common law claim pending a determination by the Civil Aeronautics Board of plaintiff's statutory

claim. In reversing the Court of Appeals and allowing the plaintiff's common law tort claims to proceed, the Supreme Court explained "we are not faced with an irreconcilable conflict between the statutory scheme and the persistence of common-law remedies. ...The court in the present case... is not called upon to substitute its judgment for the agency's on the reasonableness of a rate -- or, indeed, on the reasonableness of any carrier practice." Id. at 299-300.

As already been discussed, however, G & T's position in this action that this Court should entertain its common law claim of rate discrimination does irreconcilably conflict with the underlying deregulatory scheme enacted by Congress and implemented by the ICC. Contrary to the situation in Nader, this Court is being asked to interpret the reasonableness of a common carrier's practice. The legislative history suggests

this inquiry is to be brought before the ICC in a challenge to the underlying exemption.

In sum, G & T claims it is the victim of discriminatory rates. If such rates are in fact being charged, competition in the transportation industry is not operating effectively as Congress and the ICC expected it would when the ICC issued the exemption for carriers of agricultural products. Consequently, Conrail is allegedly in a position where it can effectively abuse its monopoly power to the detriment of G & T and other similarly situated shippers. This is precisely the type of abuse Congress intended the ICC to address "after the fact" of deregulation. H. Conf. Rep. No. 1430, 96th Cong. 2d Sess, reprinted in 1980 U.S. Code Cong. & Ad. News 4110, 4137. Conrail's motion to dismiss G & T's common law claim of rate discrimination is granted.

B. G & T's Motion to Restore Claims Under the Act

Plaintiffs have moved the Court to restore those aspects of the original complaint asserting that Conrail's discriminatory rates constitute an effort to deny plaintiffs their statutory right to pursue liability claims for goods damaged while being shipped. 49 U.S.C. § 11707 provides shippers the right to pursue such damage claims, and 49 U.S.C. § 10505(e) provides that no ICC exemption decision can deny shippers such right. G & T claims that Conrail's increased rates seek to deny indirectly a right that may not be denired directly. Conrail counters that Judge Ackerman has already squarely examined and rejected this claim, and nothing new has been added to the record to warrant rejection of Judge Ackerman's decision.

At oral argument, heard by this Court on October 20, 1986, counsel indicated that G & T's damage claims are being independently pursued in New York proceedings. In his

opinion rendered from the bench on September 24, 1984, Judge Ackerman recognized that those damage claims were underway in New York, and rejected the very claim plaintiffs now seek to resurrect: "I am not persuaded by [plaintiff's] arguments. Plaintiffs' damage claims are being independntly... litigated in separate legal proceedings. These claims will be adjudicated according to the law and amount of plaintiffs' recovery for their alleged losses will be... unaffected by the rates charged by defendant in the interim." Ackerman, J., Opinion, filed September 28, 1984, at 11-12. With respect to plaintiffs' damage liability claims, there is nothing new in the record to indicate Judge Ackerman's decision should be overturned. Clearly G & T may continue to actively pursue its damage claims through appropriate channels.

Plaintiffs' attempt to restore this aspect of the original complaint essentially

does nothing more than raise the same charge of discriminatory rates against Conrail alleged in its common law claim. As explained earlier in this opinion, Conrail's ability to drive up G & T's rates without fear of losing G & T's business to a competitor carrier is evidence of something amiss in the deregulatory scheme envisioned byi Congress and the ICC. As has already been concluded, such irregularities were intended by Congress to be addressed and corrected by the ICC. To hold otherwise would permit every shipper with a grievance against allegedly discriminatory rates, to fashoin a claim under the Act that the carrier's rates were designed to curtail the shipper's liability claims. Such a result was not intended by Congress. Because the record before me offers no tenable grounds for readdressing Judge Ackerman's decision on this issue, plaintiffs' motion seeking

restoration of Counts III and IV of the complaint is denied.

Counsel for Conrail is to submit an appropriate order. Counsel are to send copies of this Letter-Opinion to all co-counsel.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

CIVIL NO. 84-1173

G & T TERMINAL PACKAGING CO., et al.,

Plaintiffs,

vs.

CONSOLIDATED RAIL CORPORATION,

Defendant.

TRANSCRIPT OF PROCEEDINGS

OPINION

Newark, New Jersey
September 24, 1984

BEFORE THE HONORABLE HAROLD A. ACKERMAN, U.S.D.J.

Appendix E

THE COURT: I agree. Thank you.

Well, we're dealing here with an action for damages and equitable relief which arose out of allegedly discriminatory rate increase imposed on plaintiff by defendant for its freight transportation services.

The record should reflect this morning that with respect to plaintiff's claim for equitable relief pursuant to Rule 65 of the Federal Rules of Civil Procedure, this Court held a hearing and rendered a decision which the parties, of course, have received, which this Court denied preliminary injunctive relief to the plaintiffs essentially on the ground that plaintiffs had failed to present evidence or irreparable harm within the meaning of the cases. And what I said has already been said.

In any event, plaintiff, G & T Terminal Packaging Company, Inc., ("G & T"), is a potato "repacker" who as part of its business, purchases potatoes from various

western states and resells them in the New York City area. These potatoes, as I noted in my original opinion, are transported to G & T's Hunts Point Terminal and its terminal in Kingsbridge, I believe in the Bronx, by various retail carriers. And because the western retail carriers do not have direct rail connections to New York City, the potatoes are ultimately delivered to the plaintiff by the defendant, Consolidated Rail Corporation (Conrail).

In essence, plaintiff alleges that beginning in June of 1983, defendant increased its freight transportation rate for goods shipped by plaintiff. Further, plaintiff alleges that the rates were not raised for other consignees or were not raised as much. In short, plaintiff alleges that defendant implementd a discriminatory and illegal rate increase. In so doing, G & T claims that Conrail has violated its rights under the Interstate Commerce Act as amended

as well as the constitution and the antitrust laws and the common law. Defendant concedes that such an increase was imposed on shipments made by the plaintiff but contests liability, claiming that the increase represents a reasonable effort to cover the costs of processing and defending the "disproportionately greater number of [damage] claims field by the plaintiff against Conrail." These claims arose out of a loss of good allegedly due to defendant's negligence and they are the subject of other lawsuits.

This case is presently before me, as I noted at the outset this morning, on cross-motions for partial summary judgment regarding plaintiff's claims under the Interstate Commerce Act (ICA) and the common law. For the reasons set forth below, I have decided to grant summary judgment in favor of the defendant on plaintiff's claims under the ICA and to deny both party's motions for

summary judgment regarding the liability of the defandant under the common law.

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is not to be granted unless, afater all reasonable inferences are drawn in favor of the non-moving party, there is no genuine issue of material fact, such that the moving party is entitled to judgment as a matter of law. Receive Sames v. Gable, 732 F. 2d page 49, 52 (3d Cir. 1984).

The basic facts of the rate increase are undisputed. The questions before this Court are, (1) under what body of law does plaintiff state a cause of action and (2) applying the applicable legal standards, is either party to this action entitled to summary judgment or are there genuine issues of material fact which remain to be tried.

In essence, plaintiffs contend that the rate increase is in voilation of various provisions of the Interstate Commerce Act, 49

U.S.C. Section 10741, 11705, or alternatively, in voilation of the common law which plaintiff argues remains in effect under 49 U.S.C. Section 10103. In opposing plaintiff's motion, in support of its cross-motion, defendant contends that it is except from the provisions of the ICA, that the remedies provided thereunder are exclusive 49 U.S.C. Section 10501(d), and alternatively that the common law did not prohibit discriminatory rates.

*The parties in their oral presentations presents this mirrored these arguments which they have made quite will in their briefs.

I turn first to plaintiff's claims under the ICA and what is known as the Staggers Act. Title 49 is concerned with discriminatory rate setting in a variety of its subsections. Section 10741(a) of Title 49 of the United States Code (Supp. 1984) states that a common carrier providing transportation by rail "may not charge or

receive from a person a different compensation ... for a service rendered ... than it charges or receives from another person for performing a like or contemporaneous service in the transportation of a like kind of traffic under substantially similar conditions. A common carrier that charges or receives such a different compensation for that service unreasonably discriminates."

Section 10741(b) further provides that a "common carrier providing transportation or service subject to the jurisdiction of the [Interstate Commerce] Commission ... may not subject a person, place, port or type of traffic to unreasonable discrimination."

Moreover, [a] rate ... related to transportation or service provided by a common carrier subject to the jurisdiction of the Interstate Commerce Commission ... must be reasonable." 49 U.S.C. Section 10701(a) (Supp. 1984).

The Act provides that "A common carrier providing transportation [buy rail] subject to the jurisdiction of the commission ... is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this subtitle." 49 U.S.C. Section 11705(b)(2).

Further, "[a] person may file a complaint with the commission ... or bring a civil action under (b)(1) or (2) of this section to enforce liability against a common carrier ..." 49 U.S.C. Section 11705(c)(1). Under these sections, a shipper may generally seek damages against a common carrier who sets a discriminatory rate for transportation or service. And they may seek that in a federal court. See Thurston Motor Lines v. Jordan K. Rand, Ltd., 103 S. Ct. 1343 (1983). I note, however that in such a civil action a court must take cognizance of the fact that "primary jurisdiction to determine the reasonableness of rates lies with the

Commission," Burlington Northern, Inc. v. United States, 103 S. Ct. 514 at 521 (1982), and must ordinarily "refrain from expressing a preliminary view on what national transportation policy permits before the ICC expresses its view." Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade, 412 U.S. 800, at 821 (1973).

For the reasons which follow, I find that Section 10741(a) is inapplicable in this case and I need not be concerned with the concept of "primary jurisdiction" in the instant application. Under Section 10505(a), "the Commission shall exempt a person, class of persons, or a transaction or Service when the commission finds that the application of a provision of this subtitle (1) is not necessary to carry out the transportation policy of Section 10101(a) of this title; and (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to

protect shippers from the abuse of market power." The Commission may grant total or partial exemptions from the strictures of the ICA, see Simmons v. ICC, 697 F. 2d 326 at 332 and 34, (D.C. Cir. 1982), and "[t]he commission may revoke and exception to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of Section 10101(a) of this title." 49 U.S.C. Section 10505(d). Section 10101(as) articulates national transportation policy and includes promotion of "safes, adequate and efficient transportation," 49 U.S.C. Section 10101(a)(1)(B), and "the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices." Section 10101(a)(1)(D).

In enacting the Staggers Act which authorized the Commission to pursue exemptions from regulation under the ICA, it is clear that Congress envisioned "a policy of reviewing carrier actions after the fact to correct abuses of market power." See House of Representatives Report No. 96-1430, 96th Congress, 2d Sess., 105, reprinted in 1980 U.S. Code Congressional and Administrative News 4110, 4137, I've added the emphasis.

Consequently, the Commission may exempt carriers from regulation under even Section 10741(b) quoted supra as long as the exemption fosters national transportation policy since, "should the railroads develop and abuse market power by engaging in unreasonably discriminatory conduct, the exemption will be revoked" and regulation restored. American Trucking Association v. ICC, 656 F. 2d 1115 at 1123 and 1124, (5th Cir. 1981). I've omitted the footnote.

It is undisputed that the ICC has exempted Conrail and other rail carriers from regulation under the pertinent subtitle of the ICA insofar as they are engaged in transport of agricultural commodities including potatoes with the exception of grain, soybean and sunflower seeds. See 49 C.F.R. Section 1039.10. Pursuant to its authority under Section 10505, the Commission decided to "exempt the rail transportation of fresh fruits and vegetables from all provisions of Subtitle IV [relating to Interstate Commerce] of Title 49" with the sole exception of certain informational accounting and reporting requirements which the Commission considered necessary to the monitoring and continued jurisdiction under Section 10505. See Rail General Exemption Authority - Fresh Fruits and Vegetables, 361 ICC 211, (1979). The Commission specifically stated that "we believe that the small percentage of this traffic moving by rail,

does not warrant continued regulation under Section 10741."

While I do not understand the plaintiffs to be challenging the validity of the exemption at this time, I note that the Commission has justified its decision in this regard. In a subsequent proceeding, responding to contentions that deregulation would lead to discrimination and the abuse of market power, the Commission stated: "Such abuse, however, may occur only in the absence of effective actual or potential competition. Competition may come either from other railroads other modes ... or market competition between the product in question and competing products or regions. The evidence with regard to the commodities to be exempt is ample to demonstrate the availability of competitive alternatives -- a small and/or declining rail market share indicating the existence of traffic diversion by competing modes for relatively shore hauls

indicating a potential for effective motor carrier competition. In addition, where remaining rail traffic is profitable, market competition for the commodity or region in question will require that rates be kept at competitive levels for the railroad to retain the traffic." See Rail General Exemption Authority-Miscellaneous Agricultural Commodities, 367, 289 (1983).

The Commission went on to state "that if the railroads are shown to be abusing their market power (a highly unlikely event) and the Commission can revoke the exemption and reimpose regulation."

Based on the foregoing, I find that the defendant is exempt from regulation under Section 10741. The Commission itself has confirmed the view that the general exemption describes supra applies to the parties and facts of this case, and I refer the parties to a letter that was mentioned during the colloquy, the name of Herber P. Hardy,

Director, ICC, dated October 11, 1983 which was an exhibit to the complaint.

I therefore conclude, as I indicated at the outset, that defendant is entitled to summary judment as a matter of law on all of plaintiff's claims under 49 U.S.C. Section 10741(a) and (b). As to the requirements of this subsection, plaintiff's remedy is to seek partial revocation of the exemption before the Commission unless it chosses to challenge the existing exemption as "arbitrary and capricious" under the governing case law. See American Trucking, 656 F. 2d at 1125. Neither of these claims are before me today.

I turn now to plaintiff's claim under 49 U.S.C. Section 11707. As to regulation of defendant under this Subsection 49 U.S.C. Section 10505(e) specifically provides that [n]0 exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide

contractual terms for liability and claims which are consistent with the provisions of Section 11707 of this title." Section 11717 further states that [a] common carrier may not limit or be exempt from liability imposed under Subsection (aq) of this section except as provided in this subsection." 49 U.S.C. Section 11707(c)(1), I've added the emphasis.

Consequently, if applicable, the defendant remains subject to regulation under 1170 of Title 49. See American Trucking Company, 656 F. 2d at 1124.

Section 11707(a) provides that a carrier is liable to the person "entitled to recover under the receipt or bill of lading" which must be issued by a carrier. "The liability imposed under this paragraph is for the actual loss or injury to the property caused by" the carrier. Except as provided in Section 11707, as noted supra, a carrier may not contract to limit liability imposed by this section. 49 U.S.C. Section 11707(c)(1).

Plaintiff makes a rather vigorous argument in this regard. As noted above, defendants contend that the basis for rate increase on shipments by the plaintiffs is reasonable and undiscriminatory in that the correction is intended to cover the cost of processing and defending a disproportionate number of damage claims fueld by plaintiff against defendant.

Plaintiffs further allege that defendant told them that the rate would be decreased if they stopped filing damage claims. Plaintiffs now argue that the rate increase is an indirect attempt to limit liability in violation of Section 11707(a).

I am not persuaded by this argument. Plaintiff's damage claims are being independently -- I may say this, I'm not persuaded by this argument in disposing of this aspect of the motions made this morning. Plaintiff's damage claims are being independently litigated in separate legal

proceedings. These claims will be adjudicated according to the law and amount of plaintiff's recovery for their *alleged losses will be -- and the amount of plaintiff's recovery for their alleged hospitalization will be unaffected by the rates charged by defendant in the interim.

I see nothing in Section 11707 indicating that a carrier may not increase rates to maintain a profit margin over and above claims. Plaintiff has cited me to no authority to the contrary. If defendant is setting rates in an unreasonable or discriminatory manner, plaintiff must invoke other provisions of the ICA, the common or some other source of law entitling them to relief. I find that defendant is entitled to summary judgment as a matter of law on plaintiff's claims under 11707(a) of the Act.

I turn finally to plaintiff's claims under the common law. In invoking the common law, plaintiff points to 49 U.S.C. Section

10103 in support of the contention that the ICA as amended has not preempted prior case law. Section 10103 states: "Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law."

Defendant argues that whereas "the remedies provided ... with respect to the rates, classifications, rules and practices of ... carriers, is exclusive." 49 U.S.C. 10501(d), Congress has "otherwise provided" as stated in Section 10103 and plaintiff has no remedy under the common law. I do not agree.

First, Section 10501(d) when read in full states that "the jurisdiction of the commission and of state authorities (to the extent such authorities are authorized to administer the standards and procedures of this title ...) over transportation by rail

carriers, and the remedies provided in this title is exclusive."

In short, the section states that the jurisdiction is exclusive and not that the remedies are exclusive. The use of the singular verb form "is" confirms this reading.

As pointed out during the colloquy, defendant, in reading the provision to mean that the remedies are exclusive, inserts the term "sic" after the singular verb form and cites this Court to the legislative history of the Staggers Rail Act of 1980. See House Conference Report No. 1430, 96th Congress, 2d Sess., reprinted in, the United States Code Congressional and Administrative News 3987, at 4138 (1980).

It is true that the House Conference Report states that "[t]he remedies available against rail carriers with respect to rail rates, classifications, rules and practices are exclusively those provided by the

Interstate Commerce Act, as amended, and any other federal statutes which are not inconsistent with the Interstate Commerce Act. No state law or federal or state common law remedies are available." I do not read this statement as precluding plaintiff's reliance on common law where the statute does not as a general matter abrogate common law, see 49 U.S.C. 10103; see also PLM, Inc. v. Consolidated Rail Corporation, 490 F. Supp. 194 at 196 (E.D. Pa. 1980), where the statutory language unambiguously states that the jurisdiction of the Commission, not the remedies under the Act, is exclusive, see 49 U.S.C. Section 10501(d) and where the Commission has explicitly exempted the defendant from regulation and told the plaintifff by letter to seek relief in the courts. The case cited by defendant is inapposite for these very reasons. See Caspary v. Louisiana Land & Exploration Company, 707 F. 2d 785, 791 (4th Cir. 1983).

I therefore conclude that plaintiff may proceed with claims under common law. I cannot believe that while providing for the exemption of carriers from regulation such as those in defendant's position in this case, Congress intended to leave shippers without any remedy at all.

Regarding the applicable common law, defendant argues that it does not prohibit discriminatory rates citing to American Trucking Association v. Atchison, Topeka & Santa Fe Rail Company, 367 U.S. 397, 406 (1967). Whether or not this is so, defendant concedes in its brief at Page 26 that prior to the Act the common law "demanded little more than that [carriers] should carry for all persons who applied and that their charges for transportation should be reasonable." ICC v. B&O Railroad,, Baltimore and Ohio Railroad, I presume, 145 U.S. 263, 275 (1892).

In my judgment defendant therefore concedes that even under the common law its rates must be reasonable. Reviewing the affidavits submitted to this Court, I note there are numerous genuine issues of fact material to a determination of the reasonableness of the rate imposed by the defendant in this case. Reasonableness of the rate imposed by the defendant in this case. Reasonableness is a determination best left to the trier of fact after a full hearing on the merits. Futhermore, 1 note that discovery has not yet been completed, and I have decided to deny motions for summary judgment as to plaintiff's claims under common law.

In sum then, plaintiff's motion for summary judgment is denied in full, while defendant's cross-motion is granted insofara as it addresses plaintiff's claims under the ICA as amended and denied in so far as it addresses plaintiff's common law claims.

May I ask defendant's counsel to kindly draw an order in conformance with my determination here this morning.

MR. SHIEKMAN: I will do that.

THE COURT: Thank you so much.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL NO. 84-1173

G&T TERMINAL PACKAGING CO., et al.,

Plaintiffs,

-vs-

CONSOLIDATED RAIL CORPORATION

Defendant.

TRANSCRIPT OF PROCEEDINGS
MOTION

Newark, New Jersey

April 8, 1985

BEFORE:

THE HONORABLE HAROLD A. ACKERMAN, U.S.D.J.

Appearances:

WARREN, GOLDBERG, & BERMAN, ESQS.
BY: DAVID J. GOLDBERG, ESQ.
Attorneys for Plaintiffs

PEPPER, HAMILTON, & SCHEETZ, ESQS.
BY: DEBRA COHEN, ESQ.
Attorneys for Defendant

APPENDIX F

THE COURT: May have the appearances, please.

MS. COHEN: Debra Cohen for Conrail Corporation.

MR. GOLDBERG: David J. Goldberg, for the Plaintiff G & T Terminal.

THE COURT: Now, at the outset I would like to personally apologize to all Counsel for delay in getting out my decision which will be delivered this morning with respect to Conrail's Petition for Reconsideration. I can only tell you by way of explanation and excuse that since the beginning of this term, with the exception of two weeks, I have been constantly involved in trying criminal matters. And with the exception of Motion Days. And I'm just completing now an eight-week trial and I'm charging the jury Wednesday morning and Thursday I start another criminal case, and on the 23rd I'm starting a ten-week criminal trial. What I'm trying to say, desperately

and perhaps not articulating it too well, is that my schedule because of the effect of the Speedy Trial Act on our severely strained calendar and limited personnel, which has been the subject of publicity in the newspapers, I know you're from Philadelphia but I assure you that it's been a matter of public interest in the State of New Jersey. We are down three judges and no hope in sight at this point. It's just horrendous. It's just a terrible situation and it's just put me in a position where I have fallen behind. So I apoligize to both sides and I will be ruling this morning. I know the parties did not expect oral argument on that point. We are here this morning in addition to that with respect to defendant's Motion to dismiss Count 6 of plaintiff's Complaint in this matter, okay? So I'll be issuing two decisions this morning.

Miss Cohen, I've read your papers with respect to your Motion with respect to Count

6 and essentially, as I read it, it's that Conrail is not a State actor and, therefore, plaintiff hasn't go a leg to stand on.

MS. COHEN: That's essentially correct, your Honor.

THE COURT: Is there anything else you want to say with respect to the points that you made in your brief?

MS. COHEN: No, your Honor. We have covered everything in our brief.

THE COURT: All right.

Mr. Goldberg?

MR GOLDBERG: Your Honor, on the Summary Judgment Motion, I think that we have given the response fully in our papers. I would say that while I understand what the Court said about the Motion for reargument, there is one case I would add to the extent that the Court could possibly consider it. It is in a sense cumulative but it's Nader v. Allegheny Airlines and I would bring that to the Court's attention, 426 U.S. at 299. And

it refers to the Abilene case. And it's consistent with the argument we make that the nature of the statute before Abilene as against what is now before this Court is totally different.

THE COURT: All right. Let me deal with the two problems which are presently before me.

This is an action for damages and equitable relief arising out of alleged discriminatory rate increases imposed on plaintiff, a potato re-packer named G & T Terminal Packaging Co., by the defendant, Consolidated Rail Corporation (Conrail) for its freight transportation services. This is not the first time the parties have been before this Court on this matter as they both know.

On June 11, 1984, a hearing was held and by Opinion filed September 7, 1984, I denied plaintiff's application for preliminary injunctive relief.

Then on September 24, 1984, on Cross-Motions for Partial Summary Judgment, I granted Summary Judgment to defendant on plaintiff's claims under the Interstate Commerce Act as amended and denied both parties' Motions with respect to plaintiff's claims under the common law. Defendant then timely moved for reargument and reconsideration of this Court's denial of its Motion for Summary Judgment with respect to plaintiff's common law claims. On consent of all parties I decided to make my decision on defendant's Motion under Local Rule 12I without benefit of oral argument pursuant to Rule 78 of the Federal Rules of Civil Procedure. And as noted a few minutes ago, this Motion until this morning was still pending before this Court, for the reason I hope I have adequately given to the parties.

This matter is also presently before me this morning, as just noted, on defendant's Motion for Summary Judgment on Count 6 of the

Complaint filed February 15, 1985. I've decided, in the interests of judicial economy and because of the interrelationship between the pending Motions herein, to rule on both the pending Motion for Reconsideration and the instant Summary Judgment Motion.

I turn first to defendant's Motion for Reconsideration. For the reasons set forth below, I have decided to deny defendant's Motion in this regard.

Rule 12I of the Rules of the U.S. District Court for the District of New Jersey, provides for reargument and reconsideration only where Counsel presents new factual matters or controlling decisions which this Court has overlooked in rendering the ruling regarding which reconsideration is requested. Although the rule itself is silent on this point, I may also reconsider a prior ruling if I am "convinced that it is clearly erroneous and would work a manifest injustice." See Arizona v. California, 103

S. Ct. 1382 at 1391, n. 8 (1983) (discussing law of the case doctrine).

The defendant herein does not seriously contend that new facts or controlling decisions have come to light which were not considered by this Court in its September 24 oral ruling. Thus I turn to the question of whether my denial of defendant's Motion for Summary Judgment on plaintiff's common law claims was clearly erroneous. Although the legal question presented is not without doubt, I do not believe that my holding was clearly erroneous.

In my September 24th Opinion, after concluding that defendant was entitled to judgment on plaintiff's claims under the Interstate Commerce Act as a matter of law, I further concluded that common law remedies were available to plaintiff. I held in pertinent part as follows: I turn finally to plaintiff's claims under the common law. In invoking the common law, plaintiff points to

49 U.S.C. Section 10103 in support of the contention that the ICA as amended has not preempted prior case law. Section 10103 states: "Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law."

Defendant argues that whereas "the remedies provided . . . with respect to the rates, classification, rules and practice of . . . carriers, is exclusive," 49 U.S.C. 10501(d), Congress has "otherwise provided" as stated in Section 10103 and plaintiff has no remedy under the common law. I do not agree.

First, Section 10501(d) when read in full states that "the jurisdiction of the commission and of state authorities (to the extent such authorities are authorized to administer the standards and procedures of this title . . .) over transportation by rail

carriers, and the remedies provided in this title is exclusive."

In short, the section states that the jurisdiction is exclusive and not that the remedies are exclusive. The use of the singular verb form "is" confirms this reading.

As I pointed out during the colloquy, defendant, in reading the provision to mean that the remedies are exclusive, inserts the term "sic" after the singular verb form and cites this Court to the legislative history of the Staggers Rail Act of 1980. See House Conference Report No. 1430, 96th Congress, 2d Sess., reprinted in, the United States Code Congressional and Administrative News 3978, at 4138 (1980).

It is true that the House Conference Report states that "(t)he remedies available against rail carriers with respect to rail rates, classification, rules and practices are exclusively those provided by the

Interstate Commerce Act, as amended, and any other Federal statututes which are not inconsistent with the Interstate Commerce Act. No State law or Federal or State common law remedies are available." I do not read this statement as precluding plaintiff's reliance on common law where the statute does not as general matter abrogate common law, see 49 U.S.C. 10103; se also PLM, Inc. v. Consolidated Rail Corporation, 490 F. Supp. 194 at 196 (E.D. Pa. 1980), where the statutory language unambiguously states that the jurisdiction of the Commission, not the remedies under the act, is exclusive, see 49 U.S.C. Section 10501(d) and where the Commission has explicitly exempted the defendant from regulation and told the plaintiff by letter to seek relief in the courts. The case cited by defendant is inaposite for those very reasons. See Caspary v. Louisiana Land & Exploration Company, 707 F. 2d 785, 791 (4th Cir. 1983).

I therefore conclude that plaintiff may proceed with claims under common law. I cannot believe that while providing for the exemption of carriers from regulation such as those in defendant's position in this case, Congress intended to leave shippers without any remedy at all.

I further concluded that the common law required that rates for transportation services be reasonable and that genuine issues of fact precluded summary adjudication of plaintiff's common law claims in this regard.

In support of its argument that the Interstate Commerce Act as ammended by the Staggers Act premepts all State common law and regulatory power regarding the reasonableness of rates, defendant relies heavily on the Supreme Court's decision in Texas & Pacific Railway v. Abilene Cotton Oil Co., 204 U.S. 426 (1907).

In Abilene, the Supreme Court addressed the question of what effect the ICA, prior to its revision in 1980 by the Staggers Rail Act, had "upon the right of shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission . . . and which it was the duty of the carrier under law to enforce as against the shippers." See Page 436.

The Supreme Court concluded that such common law remedies were inconsistent with the ICA and that continued viability of such remedies would result in the virtual destruction of the ICA and its remedial provisions. See Pages 439 to 442.

I find this case to be entirely distinguishable from the instant one. First, Abilene was decided long before the ICA was

amended by the Staggers Act in "an attempt to revitalize the nation's railroad system by substantially deregulating rate-setting for interstate rail carriers: such as the defendant herein. See, for example, State of Texas v. United States, 730 F.2d 339, 344 (5th Cir. 1984).

Second, Abilene addressed the question of whether a Court could review the reasonableness of a rate established by the Commission and not the reasonableness of a rate establshed by a carrier which has been deregulated under the Staggers Act and exempted by the Commission itself from the requirements of the ICA. Se Abilene at Page 448.

Defendant also relies on a series of Supreme Court cases decided after the Staggers ACt was enacted. See Burlington Northern, Inc. v. United States, 459 U.S. 131 (1982); Chicago & Northwestern Transportation Co. v. Kalo Brick & Title Co., 450 U.S. 311

(1981); Consolidated Rail Corp. v. National Association of Recycling Industries, Inc., 449 U.S. 609 (1981) (per curiam). These cases, too, are distinguishable from the instant one.

In essence, these cases make clear that when a particular carrier policy or practice is squarely within the jurisdiction of the Commission and the Commission either has acted or has jurisdiction to act on the merits of the shippers' complaint, the Commission has both "exclusive," see 49 U.S.C. Section 10501(d) (Rev'd 1984); Kalo Brick, 450 U.S. at 325, and "primary," see Burlington Northern, 459 U.S. at 141; Recycling Industries, 449 U.S. at 612, jurisdiction over the matter. That the Commission's jurisdiction is exclusive, with the exception of certain State agencies certified by the ICC, means that a shipper may not seek common law redress in court where it has already been denied in relief it

seeks by the Commission or when the Commission's doors remain open to the shipper in this regard. See Kalo Brick cited supra at pages 325 and 326.

Primary jurisdiction, by contrast, "means that a shipper complaining that a carrier's rate, rule or practice is unreasonable or discriminatory must exhaust the administrative jurisdiction over the subject matter before seeking a judicial determination of the question." See First Pennsylvania Bank v. Easter Airlines, Inc., 731 F.2d 1113, 1120 (3d Cir. 1984).

Neither the doctrine of "exclusive" nor that of "primary" jurisdiction bar plaintiff's pursuit of common law remedies in this case.

With regard to the Commission's exclusive jurisdiction, the Supreme Court has held "that the ICA precludes a shipper precludes a shipper from pressing a State Court action for damages against a regulated

carrier when the ICC . . . reaches the merits of the matters the shipper seeks to raise in State Court. We reserve for another day the question whether such a cause of action lies when no application is made to the Commission." Kalo Brick cited supra at Pages 331 and 332. (Emphasis added).

In the instant case, the Commission has ecplicitly deregulated Conrail with respect to the sort of freight transportation services at issue in this case. Furthermore, when plaintiff attempted to seek redress from the Commission it was told that for this reason the Commission could provide no redress and that plaintiff would instead have to seek relief in the courts. The Director of the Office of Proceedings of the ICC, Heber P. Hardy, in response to a letter by plaintiff's Counsel, specifically wrote to Counsel as follows: The ICC no longer excercises jurisdiction over the rates charged by the railroads fr the movement of

the commodities covered by the exemption or over the practices engaged in by the railroads in the course of transporting them. Because your client and its affiliates appear to deal only in products covered by the agricultural commodities exemption, any dispute they may have with Conrail, or other railroads, would have to be settled in the courts rather than before the Commission. See letter of Mr. Hardy dated October 11, 1983, Exhibit B to Complaint.

I cannot see, under the circumstances presented herein, how either doctrine can preclude plaintiff from pursuing common law remedies at this juncture.

I turn now to the question of whether the ICA or the Staggers Act amending its preempts State common law remedies for unreasonable rates charged by common carriers. The Supreme Court has recently summarized the law of Federal preemption: "When federal pre-emption is invoked under

the directive of the Supremacy Clause, it falls to this Court to examine the presumed intent of Congress. See Fidelity Federal Savings & Loans Assn. v. De la Cuesta, 458 U.S. 141, 152-153 (1982). Our task is quite simple if, in the federal enactment, Congress has explicity mandated the pre-emption of state law, see Shaw v. Delta Air Lines, 462 U.S "-- I don't have the page citation--" (1983), or has adequately indicated an intent to occupy the field of regulation, thereby displacing all state laws on the same subject, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

"Even in the absence of such express language or implied congressional intent to occupy the field, we may nevertheless find state law to be displaced to the extent that it actually conflicts with federal law. Such actual conflict between state and federal law exists when 'compliance with both federal and state regulations is a physical

impossibility,' Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' Hines v. Davidowitz, 312 U.S. 52, 67 91941). See Michigan Canners and Freezers Assn. v. Agricultural Board, 467 U.S. "-- once again, 1 don't have the page number --" (1984); Fidelity Federal Savings & Loan Assn. v. De la Cuesta, supra."

Brown v. Hoten and Restaurant Employees & Bartenders, 104 S.Ct. 3179 at 3185 (1984); see also Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977).

As noted supra, the ICA as amended by the Staggers Act states that "(e)xcept as otherwise provided . . . the remedies provided . . . are in addition to remedies existing under another law or at common law." 49 U.S.C. Section 10103. In essence, defendant argues that the exclusive

jurisdiction provision of the Act, 49 U.S.C. Section 10501(d), as construed in light of the House Report, acts as express or implied intent to preempt State law. In considering this argument, I am mindful "of the clear statement rule of statutory construction governing such a conclusion. Under this rule, a Court cannot find that a Federal law preempts State regulation of an activity historically regulated by the States, unless Congress has given a 'clear statement' of its intent to preempt." See State of Texas cited supra at Page 341 citing Jones v. Rath Packing Co. cited supra at Page 525.

In light of these considerations, the holding in Kalo Brick quoted supra and my holding that the exclusive jurisdiction of the Commission does not preclude an aggrieved shipper from seeking redress in court where the Commission has declined to exercise its jurisdiction, I find that the exclusive jurisdiction provision does not itself

indicate a preemptive intent of Congress sufficient to abrogate State law remedies of the sort invoked herein.

I do not believe that State of Texas is to the contrary. In that case, the Fifth Circuit held that Section 214 of the Staggers Act of 1980, 49 U.S.C. Section 10501, 10707a, 10709, and 11501, preempted State regulation of intrastate rate-setting for interstate rail carriers. 730 F.2d at 346-48, 353. Noting that the Staggers Act instituted "a major reallocation of regulatory authority between the Federal and State Governments," See Page 345, through the "elimina(tion) (of) independent State regulation of the intrastate rates of interstate rail carriers," see Page 346, the Court found "preemption of State law (to be) implicit in the goals and operation of the . . . Act . . . ." See Page 347.

The Court noted the Act's intent to deregulate, giving "carriers the freedom to

set competitive rates determined mainly by market forces," see Page 345. I've omitted the footnote and eliminating "the previous lack of rate-setting." See Page 347. The Court concluded that the Act clearly intended to preempt State regulation of rate-setting.

I agree that after the Staggers Act, a State may not implement its own statutory scheme regulation rate-setting without proper certification by the ICC. However, this rule does not govern this instant case. That a State regulatory scheme is preempted in no way implies that State common law is preempted so as to preclude a State Court or a Federal Court applying State law, from granting relief to an individual shipper who is aggrieved by an individual who has set the rates in issue, not the State, and that a Court may hold the carrier accountable in damages under common law is simply one of the market forces a deregulated carrier must consider in setting competitive rates.

Turning, then, to the question of whether a common law right of action for damages for an unreasonable rate charged by a deregulated common carrier "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." See Hines v. Davidowitz, 312 U.S. 52, 67 (1941) quoted in Brown, 104 S. Ct. at 3185. I find that it does not.

I do not believe that judicial adjudication of the reasonableness of rates pursuant to common law in those circumstances where neither the primacy nor exclusivity of the Commission's jurisdiction bars judicial redress, see my discussion supra, is in any way inconsistent with or an obstacle to the Congressional goal of deregulation of the rail industry. And, as I stated orally on September 24, I do not believe that in deregulating rail carriers and providing for ICC exemption as in the instant case, that Congress intended shippers to have no remedy

at all for the imposition of unreasonable rates. While I am aware that plaintiff could seek revocation of the exemption by the Commission, an individual example of the abuse of market power by this defendant in this case is unlikely to achieve that result.

My conclusion in this regard is substantially bolstered by the Third Circuit's decision in First Pennsylvania Bank, 731 F.2d 1113. In that case, the Court of Appeals considered the effect of deregulation of air carriers on the rights of aggrieved litigants. The Court found that when the Civil Aeronautics Board (CAB) "was shorn of its powers to pass upon the reasonableness of rates for interstate air transportation of property" the doctrine of "primary jurisdiction" was "abrogated pro tanto" and "(t)he Courts were thus left free to proceed without circuity to apply directly the familiar Federal common law rules...." See Page 1120.

In short, in the context of a statutory scheme not dissimilar to the one at issue here, the Court concluded that "(t)he legal sequelae of deregulation, therefore, had no impact upon the applicability of the Federal common law . . ." See Page 1122. While the Court did not discuss the question of preemption, implicit in its holding is the conclusion that Congressional intent to deregulate does not preempt common law causes of action with regard to practice in question.

I, therefore, conclude that neither the primacy or the exclusivity of the ICC's jurisdiction nor the generally preemptive effect of the Staggers Act regarding State regulation of rate-setting preclude G & T Terminal Packaging from pursuing its common law claims in this court. The Motion for Reconsideration is denied.

I turn finally to the defendant's Motion for Summary Judgment on Count 6 of

plaintiff's Complaint. For the reasons set forth below, I have decided to grant defendant's Motion in this regard.

Count 6 states as follows: "To the extent that Conrail has been authorized by Federal law, or by action of the Interstate Commerce Commission to impose this discriminatory additional freight charge upon plaintiffs, plaintiffs' constitutional rights to due process and equal protection has been violated."

In support of its Motion, Conrail argues that plaintiff has failed to state a claim under the U.S. Constitution because Conrail is a private company, is not a State actor under the cases and thus there is no State action alleged. In light of my ruling supra, I need not address defendant's arguments further.

In its brief, plaintiff has made the following statements to this Court through Counsel:

(1) "Plaintiff's contentions under Count 6 of the Complaint would arise only if it is finally conlcuded judicially that plaintiff's have no remedy under either the ICA or the common law . . . ." See Page 2.

(2) "The Constitutional issues . . . need not be reached by this Court in view of the decision that plaintiff's common law rights have not been abrogated by Congressional action." See Page 2.

(2) "Plaintiffs concede that these Constitutional rights are not triggered if remedies are available to them pursuant to Federal law of the common law." See Page 4.

Based on these concessions and because I've held that plaintiff may pursue its common law remedies, Summary Judgment is granted in defendant's favor on all Constitutional claims without prejudice. As I understand it, plaintiff does not oppose this relief in light of my holding supra.

I don't know who to turn to draw the Order. I suppose in the final analysis I should call upon you, Mr. Goldberg. Have you submitted an appropriate Order?

MR. GOLDBERG: Well, I don't think my Order would cover the precise relief that the Court has fashoined this morning.

THE COURT: If it does not, then may I impose upon you to sumit an Order which does?

MR. GOLDBERG: Yes, your Honor. I will submit such an Order.

THE COURT: Thank you.

MS. COHEN: Thank you very much, your Honor.

(Whereupon, the matter stands adjourned.)

INTERSTATE COMMERCE COMMISSION
DECISION
No. 40045

CONSOLIDATED RAIL CORPORATION-DECLARATORY ORDER-EXEMPTION

The Commission finds that it does not lose jurisdiction over a matter that it has exempted from its regulation pursuant to 49 U.S.C. 10505. Moreover, no common law rights or remedies are revived by virtue of the exemption. The only recourse available to a person aggrieved with respect to a matter that has been exempted under Section 10505 is to petition for partial or complete revocation of the exemption under 49 U.S.C. 10505(d).

Constance C. Abrams, Russell M. Blau, Paul A. Cunningham, Richard B. Herzog, and Laurence Z. Shiekman for Consolidated Rail Corporation.

David J. Goldberg for G. & T. Terminal Packaging Co., Inc.

Decided: February 27, 1986

Appendix G

Consolidated Rail Corporation (Conrail) has asked us, pursuant to 5 U.S.C. 554(e), to resolve a controversy concerning the existence and extent of our jurisdication over rates charged for movements which we have exempted from our regulation pursuant to 49 U.S.C. 10505. We find that a declaratory order is appropriate here. The issue presented is purely legal one that does not require any factual determinations. Yet it arises from a genuine controversy which requires a resolution of the issue.

BACKGROUND

The immediate controversy involved here related to the rates charged by Conrail to the G. & T. Terminal Packing Company, Inc. (G&T) for transcontinental shipments of potatoes in 1983 and 1984. G&T claims that the rates charged to it were discriminatory because they substantially exceeded the rates Conrail charged other similarly situated shippers.

Rail carriers subject to the jurisdiction of the Interstate Commerce Commission, such as Conrail, are generally prohibited from unreasonably discriminating between shippers for providing substantially the same service. See 49 U.S.C. 10741. An aggrieved shipper may normally seek relief from unreasonable discrimination by filing a complaint with the Commission pursuant to 49 U.S.C. 11701.

However, under 49 U.S.C. 10505, the Commission has the power to exempt "a person, class of persons, or a transaction or service" from most provisions of the Interstate Commerce Act (ICA) when we find that regulation is not necessary. 1/ The movements involved in this controversy had been exempted from rate regulation by the Commission pursuant to this Section 10505 power.

Specifically, we exempted rail transportation of potatoes from our

regulation in Rail General Exemption Authority--Miscellaneous Agricultural Commodities, 367 I.C.C. 298 (1983).2/ We found (id. at 302-303) no need to regulate the transportation of most agricultural products due to:

> the availability of competitive alternatives--[as evidenced by] a small and/or declining rail market share indicating the existence of traffic diversion by competing modes, or relatively short hauls indicating a potential for effective motor carrier competition.

We concluded (id. at 302) that the abuses to which our regulation is primarily addressed "may occur only in the absence of [such] effective actual or potential competition." But we also pointed out (id. at 303) that "if railroads are shown to be abusing their market power (a highly unlikely event), then the Commission can revoke the exemption and

reimpose regulation." (See 49 U.S.C. 10505(d).)

In September, 1983, G&T wrote to former Chairman Taylor outlining its dispute with Conrail and explaining that it contemplated "pursu[ing] legal remedies." It asked for clarification of whether or not the Commission had "any remaining jurisdiction" with respect to discrimination disputes regarding exempted movements. Because G&T did not submit a formal petition to the agency, it did not receive a formal Commission determination of the issude. Instead, it received an informal letter response from the former Director of the Office of Proceedings stating, in pertinent part, his opinion that:

> The Interstate Commerce Commission no longer exercises jurisdiction over the rates charged by the railroads for the movement of the commodities covered by the exemption or over the practices

engaged in by the railroads in the course of transporting them. Because your client and its affiliates appear to deal only in products covered by the agricultural commodities exemption, any dispute they may have with Conrail, or other railroads, would have to be settled in the courts rather than before the Commission.

Relying on that advice, G&T brought a civil action in the United States District Court for the District of New Jersey (G. &. T. Terminal Packaging Co., et al. v. Consolidated Rail Corporation, Civil No. 84-1173) to obtain relief from the alleged discrimination. G&T claimed that it was entitled, under 49 U.S.C. 11705, to bring a civil action in federal court for a violation of Section 10741. Alternatively, it claimed a right, assertedly preserved under 49 U.S.C. 10103, to bring an action under the common law for violation of the common carrier

obligation to provide service on reasonable and non-discriminatory terms.3/

The District Court, on September 24, 1984, dismissed G&T's claims under the ICA, but held that G&T was entitled to a hearing under the common law to determine if Conrail's charges were unreasonable and discriminatory. Conrail moved for reconsideration of that ruling, but its motion was denied on April, 8, 1985.

Nevertheless, Conrail continues to believe that the Commission retains exclusive jurisdiction over any dispute with respect to rates or service on exempted movements and that there is no surviving common law cause of action with respect to common carrier obligations. Conrail maintains that G&T's exclusive remedy is to petition the Commission for total or partial revocation of the commodity exemption. It asks us to issue a formal declaration to that effect.4/

NEED FOR DECLARATORY ACTION

We recognize that the issue presented to us here is also before a federal district court in the pending civil litigation and that the federal court is competent to interpret the statute and determine jurisdictional issues of this nature. It is not our intention to undermine the court proceeding. Nonetheless, we believe it is appropriate for this agency to also consider the issue at this time, for several reasons.

First, we would not want the court to be induced by our silence into placing undue reliance on an informal letter that is not a formal, final determination by the agency itself, but only a staff member's opinion. Regardless of any appearance of authority, such a staff opinion is not binding on the agency. See Thompson v. Texas Mexican R. Co., 328 U.S. 134, 146, (1946) (Secretary of ICC, who had rejected a tendered application on grounds that the Commission lacked jurisdiction over the matter, could not bind

the agency by his action). However, because parties may be understandably misled by incorrect advice given in the letter, we believe we have an obligation to set forth the agency's views on the subject.

Second, as the agency charged with administering the ICA, we have the initial responsibility to interpret that Act and to determine our own jurisdiction. Our doing so should aid the court in its deliberations.

Finally, the court action is predicated on an asserted lack of jurisdiction by this agency. However, an administrative agency's jurisdiction, like that of a court, is a matter which cannot be waived or estopped by previous actions. See Commonwealth of Pennsylvania v. ICC, 561 F.2d 278, 286-87 (D.C. Cir. 1977) (Commission's earlier determination that it lacked jurisdiction over a matter is not binding on the agency and does not preclude later determination that it does possess that jurisdiction).

Indeed, "[a]uthority actually granted by Congress . . . cannot evaporate through lack of administrative exercise." Federal Trade Comm'n v. Bunte Bros., 312 U.S. 349 U.S. 437, 454-455 at n.18 (1946) (Administrative agency may await an appropriate opportunity or clear need to determine the extent of its jurisdiction). Therefore, if we have jurisdiction over a matter, it is our duty to assert it whenever we may reach that conclusion, no matter how belatedly it may appear to be in the context of particular litigation.

JURISDICTIONAL DETERMINATION

We conclude that we do retain jurisdiction over movements exempted under Section 10505 and that our jurisdiction over rail rates and practices of the sort involved in the present dispute is exclusive. There is no surviving common law cause of action.

There can be no serious question at this point that the Interstate Commerce Act vested

this Commission with exclusive jurisdiction over the rates and practices of interstate rail carriers, incorporating and superceding the common law relating to common carrier duties. See Arizona Grocery v. Atchison Ty., 284 U.S. 370, 384 (1932); Texas & Pc. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 440-441 (1907). In the areas under the Commission's jurisdiction, there are no surviving common law causes of action preserved by Section 10103 for the courts to administer. As the Supreme Court explained in Texas & Pac. Ry, 204 U.S. at 446-447 (emphasis added):

> [Section 10103] . . . cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the [ICA]. In other words, the act cannot be held to destroy itself . . . . [T]he manifest purpose of [Section 10103] was to make plain the intention that any

> specific remedy given by the act should be regarded as cumulative, when other appropriate common law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act.

Moreover, Section 10103 is no longer applicable to rail rates, classifications, rules and practices. it was expressly overridden by the addition, in 1980, of 49 U.S.C. 10501(d). That section states (emphasis added):

> The jurisdiction of the Commission . . . and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive.

Thus, it is clear that the ICA preempts the field of transportation regulation and that, at least where the Commission exercises jurisdiction over rail carrier rates, classifications, rules and practices, its

regulation is exclusive. The only issue that we need consider here is whether an exemption issued pursuant to Section 10505 can serve to extinguish the Commission's jurisdiction and revive the common-law with respect to common carrier duties. We believe the answer is clearly that it does not, given the structure and purpose of Section 10505.

We begin our analysis by looking to the plain language of Section 10505, which indicates that granting an administrative exemption does not diminish the ICC's statutory jurisdiction. (Of course the Commission may only exempt a matter that is in its jurisdiction.) Granting an exemption on the basis of the statutorily required findings merely affects "the application of a provision of the [the ICA]." 49 U.S.C. 10505(a) (emphasis added). Facially, the statute does not empower the ICC to remove any matter from its statutory jurisdiction.

Morever, any Section 10505 exemption is revocable, in whole or in part, at any time. 49 U.S.C. 10505(d). See Railroad Exemption-Export Coal, 367 I.C.C. 570 (1983), rev'd on other grounds sub nom. Coal Exporters Ass'n v. United States, 745 F.2d 76 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 2151 (1985). Thus, unless this revocation power is a nullity, the granting of an exemption is not -- and cannot be -- a permanent abrogation of federal jurisdiction. The potential for total or partial reimposition of regulation is always present. (Indeed, one could view the right of any person to seek selective or complete revocation of an existing preemption as the functional equivalent of a Section 11701 complaint.)

The revocation power is one of the central features of Section 10505. It ensures the usefulness of the exemption process as a means of testing and determining

the appropriate bounds of regulation in a changing transportation environment without the need for continual Congressional attention. Congress envisioned exemptions as an experimental process. It explicitly directed us to grant exemptions and then rely upon "after the fact" remedies, such as revocation. H.R. Conf. Rep. 96-1430, 96th Cong. 2d Sess. 105 (1980).

A substitution or reintroduction of regulation by another forum (whether it be a state regulatory body or another federal body such as a court) would defeat the fundamental purpose of the exemption process -- "to allow the [Commission] to grant exemptions from those requirements of the Act that were not eliminated by the [statutory] deregulation amendments" and to remove "as many as possible of the Commission's restrictions on changes in prices and services by rail carriers." H.R. Conf. Rep. 96-1430, supra, at 105. If another body were allowed to

replace the regulatory restrictions dismantled at the Commission, the agency's exemptive actions would be nugatory. Worse, the potential for variation and conflict among various decisionmakers could make the post-exemption regime more restrictive of rail carriers than the one suspended by the exemption.

We believe the issue considered here is in many ways analagous to the one recently considered by the Supreme Court in Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd. of Mississippi, 54 U.S.L.W. 4114 (decided January 22, 1986). There, the Court ruled that the federal deregulation of natural gas pricing in the Natural Gas Policy Act of 1978 (NGPA) did not constitute a retreat from federal occupation of the field and that states are therefore not permitted to step in and regulate the matter. Of course, the situation presented here is even stronger because the ICC does not lose

jurisdiction over transportation that we have exempted under Section 10505, whereas the Federal Energy Regulatory Commission (FERC) had lost the power to regulate natural gas pricing. But we believe that the same considerations which led the Court there to conclude that Congress did not allow substitute regulation by states apply with equal force to the situation before us here and dictate that ICC-issued exemptions not be nullified by regulatory actions brought in federal courts. Cf. Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 324 (1981) (State cannot impose sanctions upon, or create a cause of action against, a regulated rail carrier for doing that which only the Interstate Commerce Commission has the power to declare unlawful or unreasonable.)

Much of what the Court said in Transcontinental about federal natural gas regulation could easily describe federal rail

transportation regulation. The ICA also represents "a comprehensive regulatory scheme." Transcontinental, 54 U.S.L.W. at 4117. And, "in the early 1970's it [also] became apparent that the [rail] regulatory structure was not working [well]." Id. the Commission's artificial pricing restrictions were also said to be a major cause. Id. The partial deregulation of the rail industry, and the creation of the current Section 10505 mechanism for further deregulation by the agency itself, in the Rail Revitalization and Regulatory Reform Act of 1976 and the Staggers Rail Act of 1980, was designed in large part "to give market forces a more significant role in determining . . . the price" of rail services. Id. at 4118. Thus, in the words of the Court, the "federal decision to forgo regulation . . . [here represents] an authoritative federal determination that the area is best left unregulated, and . . . [has] as much

preemptive force as a decision to regulate." Id. (emphasis in original), quoting Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n, 461 U.S. 375, 384 (1983).

Consequently, the only recourse of an aggrieved shipper such as G&T is to seek a revocation of the applicable exemption, at least as to its shipments. If it is successful, it can obtain a remedy for any proven unlawful activity from which it has suffered. If it is not successful in having the exemption lifted for it, it may seek judicial review of the Commission's decision that regulation of the activity involved is still not necessary to satisfy federal rail transportation policy.

FURTHER RELIEF

Conrail also asks for the institution of a proceeding to determine whether the exemption involved here should remain in effect as to G&T. (Conrail opposes any revocation of the exemption.) We believe

that such a proceeding is unwarranted at this point and should await a request from G&T if it wishes to pursue that avenue. As the party seeking the change from our previous decision and the status quo, G&T would bear the burden of showing that our regulation is needed to carry out the national rail transportation policy. It should be fully prepared to shoulder that burden before we institute such a proceeding.

We find:

The Commission does not lose jurisdiction over a matter that it has exempted from its regulation pursuant to 49 U.S.C. 10505. No common law rights or remedies are revived by virtue of the exemption. The only recourse available to a person aggrieved with respect to a matter that has been exempted under Section 10505 is to petition for partial or complete revocation of the exemption under 49 U.S.C. 10505(d).

This decision will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre, and Lamboley. Commissioner Lamboley concurred with a separate expression.

James H. Bayne
Secretary

(SEAL)

COMMISSIONER LAMBOLEY, concurring:

By this decision we are re-introducing ourselves

into a controversy of our own making to acknowledge the error of an administrative advisory determination made by a Director of the Office of Proceedings that there is a loss or waiver of subject matter jurisdiction as a result of an exemption. Such is not the case.

It is an error we, of course, can remedy by simple statement. In my view, we need not attempt a more expansive treatment in an effort to "brief" the District Court.1/

However, this acknowledgement is a necessary communication to the Court which ably distinguished certain case relying in good measure upon the Commission's declination of jurisdiction. With this clarification of operative fact, the Court may wish to re-visit the "exclusive/primary" jurisdictional issues with the knowledge that we erroneously disavowed jurisdiction which effectively denied a forum for relief.